TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1965

No. [redacted] 51

Petition Not Printed
Response Not Printed

EDDIE J. HICKS, PETITIONER

vs.

DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER [redacted], 1965
CERTIORARI GRANTED FEBRUARY 1, 1966

Supreme Court of the United States

OCTOBER TERM, 1964

No. 867

EDDIE J. HICKS, PETITIONER

vs.

DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. 1]

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Ct. of App. No. 3340

[File Endorsement Omitted]

EDDIE J. HICKS, APPELLANT

vs.

UNITED STATES, DISTRICT OF COLUMBIA, APPELLEE

AGREED STATEMENT ON APPEAL—filed July 9, 1963 and approved July 10, 1963

The undersigned, Charles W. Wolfram, Esquire, attorney for the appellant and Ted D. Kuemmerling, Esquire, Assistant Corporation Counsel and attorney for the appellee, pursuant to Rule 26 of the District of Columbia Court of Appeals, do hereby submit this agreed statement of the above-mentioned case with attachments in lieu of a record on appeal.

I. *Source of the Questions Presented.*

On Wednesday, June 12, 1963, Eddie J. Hicks (hereinafter sometimes called appellant) was arrested and charged by information (Attachment A) with the crime of vagrancy under Section 22-3302 of the District of Columbia Code. The same afternoon appellant was brought before Judge Thomas C. Scalley in the Criminal Division of the District of Columbia Court of General Sessions [fol. 2] and plead not guilty. Upon the trial appellant was found guilty by Judge Scalley sitting without a jury and sentencing was set down for Thursday, June 13, 1963, and appellant was remanded to jail in lieu of $300.00 bond.

On Thursday, June 13, 1963, appellant was again brought before Judge Scalley and imposition of sentence was suspended.

Thereafter, on Saturday, June 15, 1963, appellant through his attorney, Charles W. Wolfram, Esquire, filed in the office of the Clerk of the Court of General Sessions a motion in arrest of judgment on the grounds that the Act of Congress under which appellant was charged, tried and convicted was unconstitutional. Hearing on the motion was set down and had on Thursday, June 20, 1963, before Judge Scalley who denied the motion that same day.

On Saturday, June 29, 1963 appellant through his attorney filed two copies of a Notice of Appeal (Attachment B) in the Office of the Clerk of the Court of General Sessions.

On Friday, July 5, 1963, appellant through his undersigned attorney filed three copies of a Statement of Errors Claimed (Attachment C) in the Office of the Appeals Clerk of the District of Columbia Court of Appeals.

II. *Attachments.*

A) Information with notations in Case Number DC 16577-'63.

B) Appellant's Notice of Appeal.

C) Appellant's Statement of Errors Claimed.

[fol. 3] This agreed statement, together with the above-listed attachments shall constitute the record on appeal in the above-entitled cause.

/s/ Charles W. Wolfram, Esquire
Attorney for Appellant

/s/ Ted D. Keummerling, Esquire
Attorney for Appellee

Approved this 10th day of July, 1963.

/s/ Thomas C. Scalley
THOMAS C. SCALLEY
Judge of the District of Columbia Court of General Sessions

[fol. 4] [Caption omitted]

ATTACHMENT "A" TO AGREED STATEMENT ON APPEAL

In the District of Columbia Court of General Sessions

CRIMINAL DIVISION

THE DISTRICT OF COLUMBIA, ss: APRIL TERM, A. D. 1963

Information - filed D.C. Code, c. 12, 1963

CHESTER H. GRAY, Esq., *Corporation Counsel*, by CLARK F. KING / ROBERT M. CAMPBELL

Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that

Eddie J. Hicks

late of the District of Columbia aforesaid, on or about the 19th day of MAY in the year A. D. nineteen hundred and sixty-three, in the District of Columbia aforesaid, and on Dupont Circle ~~street, avenue,~~ north, ~~south, west, east,~~ was then and there, and has been since that day and still is a vagrant, to wit; a person ~~known to be a pickpocket, thief, burglar, confidence operator and felon~~ either by his own confession or by his having been convicted in the District of Columbia or elsewhere of any of said offenses, and having no lawful employment and having no lawful means of support realized from a lawful occupation or source, and not giving a good account of himself when found loitering around in any park, highway, public building and other public place, store, shop and reservation, and at any public gathering or assembly.

~~leading an immoral and profligate life, who has no lawful employment and who has no lawful means of support realized from a lawful occupation and source.~~

~~who keeps, and operates, and frequents, and lives in and is employed in a house and other establishment of ill fame and who engages in and commits acts of fornication and perversion for hire.~~

~~who frequents, and loafs, and loiters and idles in and around and is the occupant of and is employed in a gambling establishment and an establishment where intoxicating liquor is sold without a license.~~

~~wandering abroad and lodging in a grocery and provision establishment, vacant house, other vacant building, out house, market place, shed barn, garage, gasoline station, parking lot, in the open air, and not giving a good account of himself.~~

~~and wandering abroad and begging and who goes about from door to door and places himself in and on any highway, passage and other public place to beg or receive alms.~~

~~and who wanders about the streets at late and unusual hours of the night without any visible and lawful business and not giving a good account of himself.~~

~~and who wanders abroad and lodges in Public Park, and~~ public comfort stations, living upon the charity of others, and who lives idly and without any settled home, and otherwise leading a profligate life.

~~being then and there a licensed pharmacist did make a certain fraudulent representations for the purpose of procuring a certain poison, to wit: did deliver to another person a certain drug, poison, to wit: in a certain container and did then and there fail and neglect to mark or said container the name of the drug contained therein and the directions for using the same and the word poison~~

~~then and there having a permit for the sale of poison as an insecticide did sell certain poisonous substances and did fail to record in a book for that purpose, the name of the article, the quantity delivered, the purpose for which it was to be used, the date of delivery, the name and address of the person for whom it was procured and the name of the individual personally dispensing the same~~

~~being then and there the owner and manager of a certain pharmacy and drug store did cause and permit a certain other person not then and there a licensed pharmacist, to compound, dispense, and sell at retail a certain drug, medicine, and poison.~~

~~Contrary to and in violation of an Act of Congress Police Regulation in such case made and provided, and constituting a law of the District of Columbia.~~

CHESTER H. GRAY,
Corporation Counsel

Personally appeared J. E. Thomas this 13th day of JUNE, A. D., 1963, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

Assistant Corporation Counsel in and for the District of Columbia

Judge Scalley DC 16577-63

WARRANT

No. .....

DISTRICT OF COLUMBIA, ss:

To the Chief of Police of the District of Columbia, Greetings:

Whereas, it appears by oath of

.....

that .....

committed the offense as charged on the reverse side hereof,

YOU ARE THEREFORE HEREBY COMMANDED to take the said

.....

and bring him/her before the said COURT OF GENERAL SESSIONS forthwith to answer said charge.

Witness the Honorable JOHN LEWIS SMITH, JR., Chief Judge of the District of Columbia Court of General Sessions, and the seal of said Court this ..... day of ..... A.D. 19.....

WALTER F. BRAMHALL
Clerk, Court of General Sessions

By .....
Deputy Clerk

LET THIS WARRANT ISSUE

.....
Judge, Court of General Sessions

OFFICER MUST EXECUTE CEPI

Cepi: Amount Collateral Posted $ .....
Date Collateral Posted .....
Produce Collateral Posted .....
Remarks .....

OFFICER'S NAME .....

Col. ..... No. .....

At No. ..... Precinct ..... Date .....

DISTRICT OF COLUMBIA

Eddie J. Hicks

Age 25 Color W

Notified to appear in Court at .....

INFORMATION
VAGRANCY
VIOLATION OF POLICE REGULATIONS
VIOLATION ACT OF CONGRESS

WITNESSES

J. E. Thomas Officer

JUN 12 1963

Atty Timberlake Appt

Plea Not Guilty

Judgment Guilty

Cont. 6/13/63

Bond 300 CHD

JUN 13 1963
Disposition of Sentence Suspended

C.11

6-15-63 motion to set aside finding of guilty & for judgement pro, of dismissal or for new trial & for arrest of judgement. Rec'd & filed this date set for 6-20-63 R.10,

JUN 20 1963

Motion to set aside finding of Guilty & for Judgment of Dismissal or for arrest of judgment or for New Trial heard & Denied

June 29, 1963
Notice of Appeal Filed.

(FILE ENDORSEMENT OMITTED)

JUN 26 1963 Appeal fee rec'd & 16577-63 B — OCC

5.5

[fol. 6]

4

[fol. 7]

ATTACHMENT TO AGREED STATEMENT ON APPEAL

IN THE DISTRICT OF COLUMBIA COURT
OF GENERAL SESSIONS

Criminal Division

Case No. DC 16577-'63

[File Endorsement Omitted]

UNITED STATES DISTRICT OF COLUMBIA

vs.

EDDIE J. HICKS

MOTION TO SET ASIDE FINDING OF GUILTY AND FOR JUDGMENT OF DISMISSAL, OR FOR NEW TRIAL,
AND
MOTION FOR ARREST OF JUDGMENT—filed June 15, 1963

Now comes the defendant, Eddie J. Hicks, by his counsel, Charles W. Wolfram, and moves the Court to set aside the finding of guilty herein and for judgment of dismissal of the information in accordance with defendant's motion for dismissal, or in the alternative for a new trial, or for a new trial generally, or in the alternative for arrest of judgment, on the following grounds:

(A) Motion for New Trial

(1) There was no substantial and competent evidence to sustain the finding of guilty.

(2) The defendant upon all the evidence and upon [fol. 8] the law applicable thereto under the decisions of the District of Columbia Court of Appeals, The United States Court of Appeals for the District of Columbia Circuit, the Supreme Court of the District of Columbia, and the Supreme Court of the United States, was en-

titled as a matter of law to a finding of not guilty at the conclusion of all the testimony.

(B) Motion for Arrest of Judgment

(1) The judgment should be arrested and the information dismissed or a new trial granted because Sections 22-3302(3) and 22-3302(9) of the District of Columbia Code were unconstitutionally applied to the defendant in violation of his rights, without limitation or waiver by their specification, under the Constitution of the United States, to wit:

a) the Freedom of Assembly and Freedom of Speech clauses of the First Amendment in that the sections were applied so as to deprive defendant of his rights to rest and associate in a public park with his friends and acquaintances and sing, talk and play upon musical instruments with them;

b) the Due Process clause of the Fifth Amendment in that the sections were applied so as to deprive defendant of liberty and property by means of an unreasonable discrimination solely because defendant was poor and unemployed and/or because defendant was untidy and unshaven and/or because defendant was playing a guitar and/or because defendant was associating with a member of the Negro race and/or for some other unreasonable cause or causes unknown; and, further, in that the words of the sections as used in the information did not sufficiently apprise defendant of what constituted elements of the offense alleged such as "an immoral and profligate life" so that defendant could intelligently make [fol. 9] his defense;

and c) the Cruel and Unusual Punishments clause of the Eighth Amendment in that defendant was punished under these sections for being artistic, for being poor, for being unemployed and generally for having outraged by his status and conduct an unknown and unconstitutionally severe code or moral standards.

(2) The judgment should be arrested and the information dismissed because Sections 22-3302(3) and 22-3302(9) of the District of Columbia Code under any reasonable construction are unconstitutional on their face

because they violate the following clauses, without limitation or waiver by their specification, of the Constitution of the United States, to wit:

a) the Bill of Attainder clause of Section 9 of Article I in that the sections punish as a crime the status or condition of being poor and unemployed without admitting explanation or excuse or requiring a showing by the prosecution that such poverty and unemployed was initiated and maintained willfully and with aforethought;

b) the Due Process clause of the Fifth Amendment in that the sections discriminate unreasonably against the poor and unemployed and in favor of comfortable and employed persons who may nonetheless be "immoral and profligate" with impunity; and, further, in that the sections are fatally vague and cannot be used reasonably by any person to regulate his conduct; and, further, in that the sections permit and encourage the police to enforce upon private citizens the eccentricities of their own moral standards or, under the guise or morals, to pursue and vindicate a personal dislike, distaste or hatred for particular individuals, groups or races;

and c) the Cruel and Unusual Punishments clause [fol. 10] of the Eighth Amendment in that the sections make criminal the status or condition of being poor and unemployed without regard to whether it is within the power of the condemned class of millions of persons to remove themselves from the situation which the sections proscribe.

/s/ Charles W. Wolfram
CHARLES W. WOLFRAM
Attorney for Defendant
701 Union Trust Bldg.
Washington 5, D.C.

NOTICE

To: Chester H. Gray, Esq.
Corporation Counsel

Please take notice that the foregoing motions will come on for hearing before Judge Thomas C. Scalley, of said Court, on Thursday, June 20, 1963, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, without further notice to you.

/s/ Charles W. Wolfram
Attorney for Defendant

NOTICE TO CLERK

The Clerk of said Court will please set the foregoing motions for new trial and for arrest of judgment for hearing before Judge Thomas C. Scalley, who tried said cause, on Thursday, June 20, 1963, at 10:00 o'clock A.M., or as [fol. 11] soon thereafter as counsel may be heard.

/s/ Charles W. Wolfram
Attorney for Defendant

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 12]

ATTACHMENT TO AGREED STATEMENT ON APPEAL

IN THE DISTRICT OF COLUMBIA COURT
OF GENERAL SESSIONS

ORDER—June 20, 1963

Motion to set aside finding of guilty and for judgment of dismissal or for arrest of judgment or for new trial heard and denied.

JUDGE SCALLEY

[fol. 13]

ATTACHMENT "B" TO AGREED STATEMENT ON APPEAL

IN THE DISTRICT OF COLUMBIA COURT
OF GENERAL SESSIONS

Criminal Division

Case No. DC 16577-'63

[Title Omitted]

* * * *

NOTICE OF APPEAL—filed June 29, 1963

Name and address of appellant: Eddie J. Hicks, c/o 1617-15th Street, Northwest, Washington, D. C.

Name and address of appellant's attorneys: Charles W. Wolfram, Esq., and M. Michael Sharlot, Esq., 701 Union Trust Building, Washington 5, D. C.

Offense: Vagrancy (D. C. Code, Section 22-3302).

Date of judgment or order: June 20, 1963

Brief description of judgment or order: Motion in arrest of judgment denied.

Where confined, if not on bail: Released on personal recognizance.

The above-named appellant hereby appeals to the District of Columbia Court of Appeals from the judgment or order above-mentioned.

/s/ Charles W. Wolfram, Esq.

/s/ M. Michael Sharlot, Esq.
Attorneys for Appellant

[fol. 14]

* * * *

[DESIGNATION OF RECORD—filed July 5, 1963
(omitted in printing)]

[fol. 15] * * *

[fol. 16]

ATTACHMENT "C" TO AGREED STATEMENT ON APPEAL

IN THE DISTRICT OF COLUMBIA COURT
OF GENERAL SESSIONS

Criminal Division

Case No. DC 16577-'63

[File Endorsement Omitted]

EDDIE J. HICKS, APPELLANT

vs.

UNITED STATES DISTRICT OF COLUMBIA, APPELLEE

STATEMENT OF ERRORS CLAIMED—filed July 5, 1963

Now comes appellant through his attorney Charles W. Wolfram, Esq., and states that the following is the error which appellant claims occurred in the trial court and upon which appellant intends to rely on appeal:

> That the court erred in denying appellant's motion for arrest of judgment on the grounds that the statute under which appellant was convicted is unconstitutional on its face.

/s/ Charles W. Wolfram, Esq.
Attorney for Appellant

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 17] * * *

[fol. 18]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 19]

[File Endorsement Omitted]

[fol. 20]

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

[MINUTE ENTRY OF ARGUMENT—November 18, 1963 (omitted in printing)]

[fol. 21]

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3340

EDDIE J. HICKS, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

Appeal from the District of Columbia Court of General Sessions

Argued November 18, 1963

* * *

Charles W. Wolfram, with whom *M. Michael Sharlot* was on the brief, for appellant.

Ted D. Kuemmerling, Assistant Corporation Counsel, with whom *Chester H. Gray*, Corporation Counsel, *Milton D. Korman*, Principal Assistant Corporation Counsel, and *Hubert B. Pair*, Assistant Corporation Counsel, were on the brief, for appellee.

OPINION—February 5, 1964

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.

HOOD, *Chief Judge:* Our Code provides that certain classes of persons shall be deemed vagrants. One such class is:

> "Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source." Code 1961, 22-3302 (3).

Appellant was convicted of vagrancy under this classification. On this appeal no contention is made that the evidence was insufficient to bring appellant within the classi-

fication, and the record contains no recital of the factual situation upon which the arrest and conviction were based. Appellant asserts only the claim that this classification of vagrancy is unconstitutional.

In approaching the question as presented we bear in mind two propositions. First, a presumption of constitu- [fol. 22] tionality attaches to all Acts of Congress; [1] and second, a court of limited jurisdiction should not declare an Act of Congress to be unconstitutional unless its unconstitutionality is plain and manifest.[2] We also note that in at least two instances this court has held the act in question to be constitutional.[3]

The chief attack on the act is that the words "immoral or profligate life" are vague and uncertain to such a degree as to render the classification unconstitutional. Those words were defined in a general way by this court in *Davenport* v. *District of Columbia*, D.C.Mun.App., 61 A. 2d 486 (1948), and we see no occasion to repeat or elaborate upon that definition. We note, however, that, because of what Mr. Justice Frankfurter referred to as the "intrinsic difficulties of language," [4] a certain amount of imprecision is inherent wherever words are employed. The Constitution does not require impossible standards; [5] all that is required is a reasonable degree of certainty.[6] Consequently the courts, including the Supreme Court of the United States, have been reluctant to declare statutes unconstitutional merely because of a lack of preciseness

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[1] *Henderson* v. *E Street Theatre Corporation*, D. C. Mun. App., 63 A.2d 649 (1948).

[2] *United States* v. *Lewis*, D. C. Mun. App., 100 A.2d 40, aff'd 94 U.S. App. D.C. 205, 214 F.2d 853, aff'd 348 U. S. 419 (1955).

[3] *Rogers* v. *District of Columbia*, D. C. Mun. App., 31 A.2d 649 (1943); *Thomas* v. *District of Columbia*, D. C. Mun. App., 161 A.2d 52 (1960).

[4] *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, 59 (1941).

[5] *United States* v. *Petrillo*, 332 U. S. 1 (1947).

[6] *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337 (1952).

in terms used in the statute.[7] We reject appellant's first contention.

Appellant's second contention is that the statute makes criminal the status or condition of poverty and unemployment. We do not agree. No one can be convicted under the statute simply because he is poor or unemployed. Only those who lead an immoral or profligate life are condemned by the statute; and a man of means may be convicted under the statute for leading an immoral and profligate life if his means are derived from an unlawful source, such as dope peddling or gambling.

Affirmed.

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[7] *See, e.g., Roth* v. *United States*, 354 U. S. 476 (1957) [obscene lewd, lascivous, or filthy]; *Caminetti* v. *United States*, 242 U. S. 470 (1917); and *Cleveland* v. *United States*, 329 U. S. 14 (1946) [any immoral purpose]; *Jordan* v. *De George*, 341 U. S. 223 (1951) [crime involving moral turpitude]; *In re Cregler*, 56 Cal.2d 308, 363 P.2d 305 (1961) [loiter].

[fol. 23]

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

* * * *

No. 3340 January Term, 1964

EDDIE J. HICKS, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

JUDGMENT—February 5, 1964

Appeal from the District of Columbia Court of General Sessions. This cause came on to be heard on the transcript of the record from the District of Columbia Court of General Sessions, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of said Court, in this cause, be and the same is hereby, affirmed.

ANDREW M. HOOD,
Chief Judge.

February 5, 1964.

* * * *

[fol. 24]

[Motion for rehearing covering 12 pages filed February 15, 1964; opposition to motion for rehearing filed February 20, 1964 and order denying motion for rehearing, February 21, 1964 omitted from this print.]

[fols. 25-39] * * *

[fol. 40]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 41]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18445

[File Endorsement Omitted]

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT

PETITION FOR ALLOWANCE OF APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS—filed March 2, 1964

Petition is hereby made by Eddie J. Hicks, through his undersigned attorney for allowance of an appeal from the judgment of the District of Columbia Court of Appeals entered on the 21st day of February, 1964, denying petitioner's motion for rehearing of the original judgment of that Court entered on the 5th day of February, 1964, in a case entitled Eddie J. Hicks, Appellant v. United States, District of Columbia, Appellee, No. 3340 in said District of Columbia Court of Appeals in favor of the United States, District of Columbia, against said Eddie J. Hicks.

/s/ Charles W. Wolfram
701 Union Trust Building
Washington 5, D.C.
Attorney for Petitioner

[fol. 42]

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 43]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

No. 18,445

DCCA No. 3340

[File Endorsement Omitted]

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT

Before: Wilbur K. Miller, Fahy, and Danaher, Circuit Judges, in Chambers.

ORDER DENYING ALLOWANCE OF APPEAL—April 28, 1964

On consideration of petitioner's petition for the allowance of an appeal from the District of Columbia Court of Appeals, of petitioner's brief in support thereof, of respondent's brief in opposition thereto, and of the brief of the National Capital Area Civil Liberties Union as amicus curiae in support of petitioner's petition, and of petitioner's motion for leave to prosecute his appeal without prepayment of costs, it is

ORDERED by the court that petitioner's aforesaid petition and motion are hereby denied.

Per Curiam.

WKM
JAD

Dated: April 28, 1964

Circuit Judge Fahy would grant petitioner's petition.

C.F.

[fol. 44]

* * * *

[File Endorsement Omitted]

[fol. 45]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,445

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT.

On Petition for Allowance of Appeal from the District of Columbia Court of Appeals

---

PETITION FOR RECONSIDERATION EN BANC OF DENIAL OF PETITION FOR ALLOWANCE OF APPEAL—filed May 2, 1964

On March 21, 1964, Petitioner filed his Petition for Allowance of Appeal from the District of Columbia Court of Appeals, seeking review of the decision of that Court in *Hicks* v. *District of Columbia*, 197 A.2d 154 (D.C. Ct. App. 1964). That decision had held that the conviction of Petitioner for vagrancy under Section 22-3302(3) of the D.C. Code—which defines a vagrant as one who leads "an immoral or profligate life"—was not unconstitutional. By its Order dated April 28, 1964, two judges of a [fol. 46] three-judge panel of this Court denied that Petition,* erroneously it is submitted and in unavoidable ignorance of the procedural status of the Petition.

---

* Circuit Judges Wilbur K. Miller and Danaher voted to deny the Petition. Circuit Judge Fahy would have granted it.

The Order recited that the Petition was denied upon consideration of the briefs filed in the case, including the *Brief in Opposition submitted by Respondent.* As set out in the attached affidavits, a copy of the brief in opposition was never received by either Petitioner or Amicus or their attorneys. Hence, Petitioner has never had an opportunity to reply to that brief.

As will be set out hereafter, Respondent's Brief in Opposition unquestionably required a reply in order not to be misleading. The Brief in Opposition—which was first seen by the undersigned attorney for Petitioner on the morning of April 28, 1964 (the same date upon which the Petition for Allowance of Appeal was denied)—raises for the first time a surprising new issue which attacks the very jurisdiction of this or any other Court to entertain review of Petitioner's conviction. Admittedly, as Respondent's recently discovered brief states, there can be [fol. 47] no "jurisdiction of review" in the absence of a "real, earnest and vital controversy." But that such an absence of controversy could be created by pleadings filed and acted upon without the knowledge of the other party (the reality, earnestness and vitality of whose opposition up to that point cannot be questioned) is simply unthinkable.*

Respondent's Surprise Plea to the Jurisdiction of this Court Cannot Bear Analysis

The jurisdictional argument which Respondent attempts with no little confusion to enunciate (Brf. in Opp. 2-4) actually concerns *two* separate questions, only the first of which (the contention that Petitioner is here

---

* Let nothing said here be read to reflect in any way upon the unquestionable professional honor and unstinting honesty of any of the attorneys for Respondent. Ted Kuemmerling, Esq., who has ably argued and briefed this case for Respondent here and in the Court below, has personally assured the undersigned attorney for Petitioner that he recollects that his Brief in Opposition was mailed, as his Certificate of Service states, to the attorneys for both Petitioner and Amicus. That Mr. Kuemmerling has thus fully discharged his responsibility under the Rules of this Court does not admit of even the slightest doubt.

seeking an "advisory opinion") involves jurisdictional [fol. 48] considerations. The second question involves well-settled canons which guide courts in the consideration of constitutional questions. Neither matter, when analyzed clearly, precludes review of the decision of the Court below.

The objection that this Court is being asked to deliver an advisory opinion can quickly be put to one side. What Justice Brandeis was speaking of in his famous dictum regarding the avoidance of constitutional questions in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 *et seq.*, was a case where the interests of supposedly opposing parties were, in fact, substantially similar and friendly so that no "real, earnest and vital controversy" * existed over the constitutional question sought to be put in issue. Unless Respondent can be understood here to be confessing error, or lest it be supposed that Petitioner ever is willing to admit that the words "immoral or profli- [fol. 49] gate life" in a penal statute are anything but an outrage to the Constitution, let it be realized that the record clearly shows that Petitioner is attacking his conviction for vagrancy as a nullity under the Constitution and that Petitioner intends to pursue his attack until final victory or defeat. Nothing but whimsy or confession of error by the Government could support Respondent's contention.

Some of the remaining cases cited by Respondent do raise a separate question which, although misunderstood by Respondent, should be considered and disposed of so that it will no longer be thought to cast doubt upon the ripeness of the constitutional questions raised by Petitioner. Several cases, including those cited by Respondent, have stated that certain kinds of constitutional questions are best adjudicated on a full factual record. Such a case was *Lion Mfg. Corp.* v. *Kennedy*, —— App. D.C. ——, —— F.2d —— (No. 17,832—Decided March 5, 1964), where the appellant sought a declaratory judgment to

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* The quoted matter is actually from Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892). The words are quoted by Justice Brandeis, *supra* at 346.

have the entire Gambling Devices Act of 1962 (76 Stat. 1075, 15 U.S.C. §§ 1171-78 (Supp. IV, 1963), amending Slot Machine Act of 1951, 64 Stat. 1134) declared un- [fol. 50] constitutionally vague. This Court held that one could not thus foreclose future criminal prosecution where there was no showing that the complaining party was within the impingement of the statute. The complaining party there had no *standing* to attack a criminal statute whose "immediate adverse" effect he could not show. But surely such effect and such standing must exist, if ever, after one has been convicted under the statute being attacked. This entirely inapposite situation is the situation in which Petitioner presently finds himself. The other principal case relied upon by Respondent, *United States* v. *National Dairy Corp.*, 372 U.S. 29 (1963), similarly involved an attack upon Section 3 of the Robinson-Patman Act in a preliminary motion to quash an indictment. Although the corporation had already been indicted under the statute, the trial of the case had not yet commenced and there was thus the clear possibility that no conviction would result.

In both the *Lion Manufacturing* and *National Dairy* cases, the holding of the courts that the constitutional questions presented needed additional facts for proper [fol. 51] adjudication did not preclude those complaining parties from later raising those same questions at trial. The cases merely deferred full consideration of the questions by appellate courts until after trial. But Petitioner here has already been tried, and convicted. If he cannot raise his constitutional questions here, he is effectively precluded from raising them at all.

A case which Respondent does not cite, *United States* v. *Raines*, 362 U.S. 17, 21 (1960), deals more specifically with Respondent's objection, particularly its argument (Brf. in Opp.) against consideration of the admittedly hypothetical examples cited by Amicus Curiae (Brf. for Amicus 8)—and fully endorsed by Petitioner—of the unconstitutional usages to which Subsection 3 can be put. The Court in *Raines* held that one would not be heard to attack a statute on the grounds that impliedly it might apply to other persons or other situations in which its

application might be unconstitutional, but where no complaint is made that the statute is unconstitutional as to the complaining party. This holding is entirely proper [fol. 52] in cases such as *Raines* where the attack is upon the constitutionality of a statute *as applied.* But the principal argument of Petitioner in the present case is that Subsection 3's supposed proscription against "immoral or profligate" lives is *void on its face*—that even under the most strained construction of the words "immoral or profligate" there can be no valid conviction had under it. This argument does not need hypothetical support as did the argument by the defendants in *Raines.* Subsection 3 is unconstitutional, not merely as applied to certain persons or in certain limited situations—it is unconstitutional as to all persons and in all conceivable situations. The complete answer to Respondent's objection is given by *Smith* v. *California,* 361 U.S. 147, 151 (1959):

> ". . . It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. . . ."

[fol. 53] Rare indeed is he who can claim more scrupulous care in the application of theories of judicial restraint than was Mr. Justice Frankfurter, especially in the matter of avoiding constitutional questions. Yet even Justice Frankfurter has been moved to state without the invocation of any particular state of facts that broadly written vagrancy statutes such as that involved here are unquestionably void because of their vagueness. *Winters* v. *New York,* 333 U.S. 507, 540 (1948) (dissenting opinion). That Justice Frankfurter is certainly not alone in his judgment is clear from the cases cited, among many, by Petitioner in his Brief in Support of the Petition.

In short, Petitioner's claim that his conviction was unlawful because it was obtained under a statute void on its

face would be fully justiciable and ripe for consideration by this Court if his Petition for Allowance of Appeal were granted. Respondent's arguments to the contrary—while they might have merit if the claim were that the statute was unconstitutional only as specifically applied to Petitioner—are without foundation when considered in light of the actual posture of the constitutional questions presented.

[fol. 54] Therefore, Petitioner requests that the Order of April 27, 1964, denying his Petition for Allowance of Appeal be set aside and that the Petition and the Motion for Leave to Appeal Without Prepayment of Fees and Costs be granted.

Respectfully submitted,

/s/ Charles W. Wolfram, Esq.
701 Union Trust Building
Washington, D. C.

Attorney for Petitioner

[fol. 55]

* * * * *

AFFIDAVIT OF CHARLES W. WOLFRAM

CHARLES W. WOLFRAM, Esq., first being duly sworn, says:

I am a resident and citizen of the District of Columbia and a member of the bar of this Court. My office is at 701 Union Trust Building, Washington, D. C., in the law offices of Covington & Burling, with which firm I am

associated. I am now, and have been since June 14, 1963, retained by Eddie J. Hicks to prosecute appellate review of his conviction on June 13, 1963 of the crime of vagrancy in the District of Columbia Court of General [fol. 56] Sessions, Criminal Division. This affidavit is made in connection with the Petition for Reconsideration En Banc of Denial of Petition for Allowance of Appeal.

As the records in the above-entitled case will show, a Petition for Allowance of Appeal and Brief in Support Thereof on behalf of Eddie J. Hicks was filed by me as Mr. Hicks' attorney on March 21, 1964. The purpose of the Petition is to obtain review in this Court of the decision of the District of Columbia Court of Appeals in *Hicks* v. *District of Columbia, United States*, 197 A.2d 154 (D.C. Ct. App. 1964) holding that Subsection 3 of the vagrancy statute (D.C. Code § 22-3302(3)) was not unconstitutionally vague or discriminatory.

On the afternoon of Friday, April 24, 1964, I received a letter from a friend congratulating me upon having successfully persuaded the United States Court of Appeals to hear the *Hicks* case on its merits. (It subsequently was determined that the author of the letter had misunderstood the import of the Order dated April 8, 1964 of Chief Judge Bazelon, granting the motion of the National Capital Area Civil Liberties Union to file a Brief in Support of the Petition for Allowance of Appeal [fol. 57] as Amicus Curiae and that this misunderstanding prompted his letter.) Being unaware that this Court had acted on the Petition, I called the office of the Motions Clerk on the telephone and spoke to an assistant in that office who informed me that, in fact, the Petition for Allowance of Appeal had been acted on just that morning, but that the Petition had been denied. In light of the letter to the contrary which I had just received, I asked the assistant clerk to read me the text of the Order. When the assistant clerk read the portion of the Order which stated that the Order of denial was entered upon consideration ". . . of respondent's brief in opposition . . .," I then learned for the first time and to my complete surprise that Respondent had in fact filed a Brief in Opposi-

tion to the Petition. Before that time I was not aware of the existence of such a brief and had not received or seen a copy of such brief and, of course, had not filed a Reply to such brief.

I immediately questioned closely every person in the firm of Covington & Burling who in the ordinary course of the firm's operations would have any dealings with in- [fol. 58] coming mail. Each of these persons stated to me personally that no undelivered mail was in the office and that they did not recall having received within the past few weeks any communication addressed to me from the Office of the Corporation Counsel or having delivered such to me. I am satisfied that the Government's Brief in Opposition was not delivered to this office.

The first opportunity I had to speak to Ted D. Kuemmerling, Esq., the Assistant Corporation Counsel in charge of the *Hicks* case for Respondent, was the morning of the following Monday, April 27, 1964. Mr. Kuemmerling told me over the telephone that he had indeed filed a Brief in Opposition for Respondent and had entrusted copies to his secretary to be mailed to myself and to Lawrence Speiser, Esq., Counsel for Amicus Curiae. Mr. Kuemmerling questioned his secretary about the matter and told me that she had stated that she recalled having mailed the briefs on March 31, 1964. This is the date upon which the Brief in Opposition was filed.

I regard Mr. Kuemmerling as a trusted fellow attorney and acquaintance and do not question his statements in any regard. I consider that on March 31, 1964, Mr. [fol. 59] Kuemmerling fully and fairly fulfilled his obligation under Rules 6 and 19 of the Rules of the United States Court of Appeals for the District of Columbia Circuit Governing Review of Cases from the District of Columbia Court of Appeals, by mailing a copy of his brief to me. I can only surmise that the brief was lost in the mails sometime after it left the hands of Mr. Kuemmerling's secretary and before it arrived at the offices of Covington & Burling.

The first occasion I had to see a copy of the Brief in Opposition was on the morning of Tuesday, April 28,

1964, when I received a copy which Mr. Kuemmerling had mailed to me after our telephone conversation of the previous day.

/s/ Charles W. Wolfram, Esq.

Subscribed and sworn to before
me this 1st day of May, 1964.

Mary Louise Werres
Notary Public

My commission expires: 11/14/66 (SEAL)

[fol. 60]

* * * *

AFFIDAVIT OF JULIE N. BARROWS

JULIE N. NARROWS, first being duly sworn, says:

I am a resident and citizen of the District of Columbia. I am the Executive Assistant Director of the Washington Office of the American Civil Liberties Union and Lawrence Speiser, Esq., is the Director of the Washington Office. Our offices are at Suite 803, 1101 Vermont Avenue, N.W., Washington, D. C.

I am generally familiar with the above-entitled case having followed the case in the newspapers and through communications with Mr. Speiser and Charles W. [fol. 61] Wolfram, Esq., a member of the National Capital Area Civil Liberties Union, who, I understand, was retained by Eddie J. Hicks to prosecute an appeal from a conviction for vagrancy on June 13, 1963. I understand

that this affidavit is to be filed with a Petition for Reconsideration En Banc to be filed by Mr. Wolfram on behalf of Mr. Hicks.

On April 2, 1964, Mr. Speiser entered his appearance in the above-entitled case and filed a Brief in Support of the Petition for Allowance of Appeal filed by Mr. Wolfram on behalf of Mr. Hicks.

Mr. Speiser will be out of the city until Tuesday, May 5, 1964, and thus will be unable to execute an affidavit. I have spoken to Mr. Speiser, however, and, on the basis of my own personal knowledge and this conversation, I know that the first occasion that Mr. Speiser or myself became aware that a Brief in Opposition had been filed by Respondent in the above-entitled case was on the morning of Monday, April 27, 1964, when we were informed by Mr. Wolfram that such a brief had been filed. I have responsibility for Mr. Speiser's mail and I have ques-
[fol. 62] tioned each and every person in our office who would have anything to do with matter mailed to Mr. Speiser. They are all certain, as I am, that such Brief in Opposition had not been received in our offices prior to the time on Monday, April 27, 1964, when we first learned of the existence of such brief.

/s/ Julie N. Barrows
JULIE N. BARROWS

Subscribed and sworn to before
me this 1st day of May, 1964.

/s/ Frank F. Brown
Notary Public

My Commission Expires June 14, 1967 (SEAL)

[fol. 63]

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 64]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,445

[File Endorsement Omitted]

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT

Before: Bazelon, Chief Judge, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR RECONSIDERATION
EN BANC—June 15, 1964

On consideration of petitioner's petition for reconsideration *en banc* of the denial of his petition for the allowance of an appeal from the District of Columbia Court of Appeals, it is

ORDERED by the court *en banc* that petitioner's aforesaid petition is hereby denied.

Per Curiam

Dated: June 15, 1964

Chief Judge Bazelon would grant petitioner's petition for reconsideration *en banc* and reserves the right to file a statement of his views at a later date.
Circuit Judges Fahy and Wright would grant petitioner's petition for reconsideration *en banc.*

McGOWAN, *Circuit Judge, concurs* in the foregoing order denying petitioner's petition for reconsideration

en banc: This petition to review *en banc* an order of this court denying leave to appeal from the decision in *Hicks* v. *District of Columbia*, 197 A.2d 154 (D.C. Ct. App. 1964), presents substantial constitutional questions. The resolution of these questions is urged, however, on the basis of a record which is wholly unrevealing in factual terms. When the issue is, as here, whether to exercise our discretion to bring a case here for review, the absence of such a record is for me at any rate a significant consideration. See *Hamilton* v. *Pepsi-Cola Bottling Co.*, 102 U.S. App. D.C. 256, 252 F.2d 637 (1958).

I therefore vote to deny the petition for rehearing *en banc*.

[fol. 65]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Case No. 18,445

RECEIVED
Sep 1, 1964
Clerk of the United
States Court of Appeals

United States Court of Appeals
for the District of Columbia Circuit
FILED Oct 26, 1964
/s/ Nathan J. Paulson
Clerk

[Title Omitted]

MOTION OF PETITIONER TO VACATE AND REENTER ORDER

Petitioner (petitioner-movant herein), through his undersigned attorney, respectfully moves the Court to vacate and reenter contemporaneously with the granting of this motion the order entered in the above-entitled cause on June 15, 1964. That order denied petitioner-movant's petition for reconsideration *en banc* of the denial of his petition for the allowance of an appeal from the judgment of the District of Columbia Court of Appeals in *Hicks* v. *District of Columbia*, 197 A.2d 154 (D. C. Ct. App. 1964).

The necessity for this motion arises from the neglect of the undersigned attorney for petitioner-movant to observe the special time limitations governing petitions to the Supreme Court of the United States for writs of cer-

[fol. 66] tiorari in criminal cases arising from United States Courts of Appeals. Proceeding on the erroneous assumption that the general 90-day limitation for filing such petitions applied to the instant case, the undersigned attorney for petitioner-movant failed to prepare and file a petition for certiorari within the special 30-day limitation period provided, in Rule 22(2) of the Supreme Court Rules, for petitions for writs of certiorari to the courts of appeals in criminal cases.

The petition for certiorari which petitioner-movant desires to file would be meritorious and should be considered by the Supreme Court. It is respectfully submitted that the neglect of the undersigned attorney for petitioner-movant was excusable within the meaning of Rule 22(b) of the Rules of this Court governing appeals from the District of Columbia Court of Appeals and should not be permitted to preclude review by the Supreme Court since it is within the discretionary power of this Court to cure this procedural defect. The undersigned attorney for petitioner-movant has been engaged in the practice of law for two years and has never before handled a criminal matter in any court, being engaged generally in the practice of civil corporate law. The aforementioned Rule 22 (b) provides for the enlargement of time, in the discretion of the Court, where the failure to act was due to excusable neglect. While the present motion perhaps does [fol. 67] not come within the specific wording of Rule 22 (b), it certainly comports with its intent and, it is submitted, the circumstances demonstrate excusable neglect. There is, of course, no question that the granting of the present motion would interfere in any way with the jurisdiction of the Supreme Court. Obviously, since the Supreme Court has not yet been approached, its jurisdiction has not yet attached to this cause and it still lies within the discretionary power of this Court to grant the relief requested.

In order therefore, to cure the procedural mistake which presently precludes review by the Supreme Court under its Rule 22(2), it is respectfully requested that this Court vacate its order of June 15, 1964, and reenter that order contemporaneously with the granting of this motion.

Since the imposition of sentences upon petitioner-movant was indefinitely suspended in the trial court and since petitioner-movant was released upon his personal recognizance or bond, the granting of this motion would not adversely affect the substantive rights of any party.

Respectfully submitted,

/s/ Charles W. Wolfram, Esq.
Attorney for Petitioner-Movant
701 Union Trust Building
Washington, D. C. 20005

[fol. 68]

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 69]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,445

September Term, 1964 DCCA # 3340

[File Endorsement Omitted]

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA, UNITED STATES, RESPONDENT

Before: Bazelon, Chief Judge, Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan, Circuit Judges, in Chambers.

ORDER VACATING AND REENTERING ORDER DENYING PETITION FOR RECONSIDERATION EN BANC
—October 26, 1964

On consideration of petitioner's motion for leave to file motion to vacate and re-enter order, of respondent's opposition thereto, and of petitioner's reply, and it appearing that petitioner's motion to vacate and re-enter order has been lodged with the clerk, it is

ORDERED by the court *en banc* that petitioner's aforesaid motion for leave to file motion to vacate and re-enter order be granted, and the Clerk is directed to file petitioner's motion to vacate and re-enter order, and upon consideration whereof, it is

FURTHER ORDERED by the court *en banc* that petitioner's motion to vacate and re-enter order be granted, and the order entered herein on June 15, 1964, is vacated, and it is

FURTHER ORDERED by the court *en banc* that petitioner's petition for reconsideration *en banc* of the denial of his petition for allowance of an appeal from a judgment of the District of Columbia Court of Appeals is denied.

Per Curiam.

Dated: Oct 26, 1964

Chief Judge Bazelon would grant the petition for reconsideration *en banc* and reserves the right to file a statement of his views at a later date.
Circuit Judge Fahy would grant the petition for reconsideration *en banc*, with conditions limiting time to apply for certiorari.
[fol. 70] Circuit Judge Wright would grant the petition for reconsideration *en banc*.

McGOWAN, *Circuit Judge, concurs* in the foregoing order denying petitioner's petition for reconsideration *en banc*: This petition to review *en banc* an order of this court denying leave to appeal from the decision in *Hicks* v. *District of Columbia*, 197 A.2d 154 (D.C.Ct.App. 1964), presents substantial constitutional questions. The resolution of these questions is urged, however, on the basis of a record which is wholly unrevealing in factual terms. When the issue is, as here, whether to exercise our discretion to bring a case here for review, the absence of such a record is for me at any rate a significant consideration. See *Hamilton* v. *Pepsi-Cola Bottling Co.*, 102 U.S.App.D.C., 256, 252 F.2d 637 (1958).

I therefore vote to deny the petition for rehearing *en banc*.
Senior Circuit Judge Wilbur K. Miller, prior to his retirement on October 15, 1964, voted to deny the petition for reconsideration *en banc*.

[fol. 71]

* * * *

[DESIGNATION OF RECORD—filed November 24, 1964 (omitted in printing)]

[fols. 72-73] * * *

[fol. 74]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 75]

SUPREME COURT OF THE UNITED STATES

No. 711 Misc., October Term, 1964

EDDIE J. HICKS, PETITIONER

v.

DISTRICT OF COLUMBIA

On Petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—February 1, 1965

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 867.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

February 1, 1965

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 787473 678

Office-Supreme Court, U.S.
FILED
AUG 25 1965
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 51

EDDIE J. HICKS,

Petitioner,

vs.

DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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Washington, D. C.

CHARLES W. WOLFRAM
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 51

EDDIE J. HICKS,

Petitioner,

vs.

DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinion Below Reported

The opinion of the District of Columbia Court of Appeals, entered on February 5, 1964, affirming petitioner's conviction, is unofficially reported at 197 A.2d 154.

Statement of Jurisdiction

This Court has jurisdiction of the present case under 28 U.S.C. § 1651(a). See *House* v. *Mayo*, 324 U.S. 42 (1945); *Holiday* v. *Johnson*, 313 U.S. 342 (1941); *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24 (1936). Section 1651(a) provides that the Supreme Court "may issue all writs necessary or appropriate in aid of" its jurisdiction. Since

the statute under which petitioner was convicted is unconstitutional on its face, the trial court had no authority to enter the judgment of conviction nor did the Court of Appeals have discretion to deny petitioner's petition for allowance of an appeal where the statute's unconstitutionality was the only grounds urged for reversal. The common-law writ of certiorari under 28 U.S.C. § 1651(a) may be employed to review such a case. *De Beers Consol. Mines* v. *United States,* 325 U.S. 212, 217 (1945). The statute (28 U.S.C. § 1254) providing for review on a writ of certiorari of cases in the Courts of Appeals arguably may not be directly applicable because of the denial by the United States Court of Appeals of petitioner's petition for allowance of an appeal. Compare *Ferguson* v. *District of Columbia,* 270 U.S. 633 (1926). Nonetheless, the action of the United States Court of Appeals properly may be reviewed upon a writ of certiorari under the general power conferred by 28 U.S.C. § 1651(a) since it lacked discretion to deny petitioner's appeal.

The timeliness of the petition for certiorari to the United States Court of Appeals for the District of Columbia Circuit is governed by Rule 22(2) of the Rules of this Court. On October 26, 1964, the United States Court of Appeals for the District of Columbia Circuit entered an order vacating and reentering its order of June 15, 1964. That order denied a petition for reconsideration *en banc* of the order of a three-judge panel of the Court of Appeals entered on April 28, 1964, which denied petitioner's then petition for the allowance of an appeal. The petition for writ of certiorari was filed on November 25, 1964. The filing of the petition for writ of certiorari was timely. *Heflin* v. *United States,* 358 U.S. 415 (1959).

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment V: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The statute principally involved is Section 22-3302(3) of the District of Columbia Code (1961 Ed.), which provides that:

> "The following classes of persons shall be deemed vagrants in the District of Columbia:
>
> • • • • •
>
> "(3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

The full text of D. C. Code Section 22-3302 and other relevant statutes is set out in Appendix D hereto.

Question Presented

Whether D. C. Code Section 22-3302(3) (1961 Ed.) which defines the crime of vagrancy as "leading an immoral or profligate life" is void under the Due Process Clause of the Fifth Amendment because the words which purport to define the prohibited conduct are vague and indefinite.

Statement of the Case

This case originated with petitioner's arrest for vagrancy in the park at Dupont Circle in the city of Washington in the early afternoon of June 12, 1963 (R. 1, 3). That same

afternoon petitioner was tried in the District of Columbia Court of General Sessions, Criminal Division, on an information charging him with vagrancy under D. C. Code, Section 22-3302, subsection 3 (hereinafter "Subsection 3") (R. 3). Petitioner pleaded not guilty but was convicted as charged by a judge of that court who sat without a jury (R. 4). Sentencing was set down for the next day and petitioner was remanded to jail in lieu of $300 bond (R. 1). On the following day (June 13), petitioner was again brought before the trial court. The same judge, exercising his discretion under D. C. Code, Section 22-3304, suspended the imposition of sentencing and released petitioner upon his personal recognizance or bond (R. 4, 1).*

By means of a motion in arrest of judgment and for a new trial (R. 5), petitioner objected that his trial and conviction could not stand because of the unconstitutional vagueness of the penal statute—Subsection 3—under which the proceedings against him were had. The trial court overruled petitioner's constitutional objection and denied the motions (R. 4, 8). An appeal was taken to the District of Columbia Court of Appeals which, on February 5, 1964, affirmed the conviction and rejected petitioner's constitutional objections. *Hicks* v. *District of Columbia,* 197 A.2d 154 (D.C. App. 1964) (R. 12-14).

On February 21, 1964, petitioner's motion for rehearing in the District of Columbia Court of Appeals was denied

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* Under such a sentence, the accused is customarily released but may be brought before the sentencing court at a later date and receive the imposition of sentence. Under D.C. CODE § 22-3304 (1961 Ed.), sentence of a fine of up to $300 and/or a term of imprisonment of up to 90 days may be imposed. There is no right to a jury trial in a vagrancy prosecution since the offense is considered "minor." See District of Columbia v. Clawans, 300 U.S. 617 (1937).

(R. 15) and on March 2, 1964, petition for allowance of an appeal was made to the United States Court of Appeals for the District of Columbia Circuit (R. 16). On April 28, 1964, a three-judge panel of the United States Court of Appeals, voting 2-1,* denied the petition for allowance of an appeal (R. 17). A petition for reconsideration *en banc* was denied on June 15, 1964, by a vote of 6-3** (R. 28-29). By the unanimous order of the United States Court of Appeals, the order of June 15, 1964, was vacated and reentered as of October 26, 1964 (R. 33-34).

On November 25, 1964, petitioner filed in this Court his motion for leave to proceed in forma pauperis and his petition for a writ of certiorari to the United States Court of Appeals. They were granted on February 1, 1965 (R. 36). 379 U.S. 998.

Summary of Argument

Petitioner was arrested and convicted under Subsection 3 of the District of Columbia vagrancy statute which provides that a vagrant is "any person leading an *immoral or profligate* life." (Emphasis supplied.) Another section of the vagrancy law provides that other elements of the offense which relate to the defendant's economic and employment status are not part of the government's burden of proof. For the purposes of this case, these elements thus may be ignored. All that the government need prove in order to

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* Circuit Judges Wilbur K. Miller and Danaher voted to deny the petition. Judge Fahy voted to allow it.

** Chief Circuit Judge Bazelon and Circuit Judges Fahy and Wright voted to grant the petition for reconsideration *en banc*. The other members of the court voted to deny it.

obtain a conviction is, therefore, that the defendant has been leading an "immoral or profligate" life.

It is the position of petitioner that Subsection 3 is unconstitutionally vague and thus that his conviction under it must be set aside.

The background and sources of the District vagrancy law are found in portions of the poor laws of fourteenth-century England. These statutes were notable for their inhumaneness and were enacted in order to hold the serfs to the land by prohibiting their wandering in search of better employment. In time, however, the vagrancy laws came to be viewed more as a means of controlling a class of potential criminals than as a regulation of the wandering of an economic class. Finally, in nineteenth-century England the concept triumphed that a mere status or condition should not be punishable as a crime. Present-day enforcemen in England is directed only against specific acts.

The District of Columbia vagrancy law and those of most of the States, however, still follow the medieval models. But the age of its historical antecedents cannot save a statute which otherwise is unconstitutionally vague, as Subsection 3 obviously is. *Winters* v. *New York*, 333 U.S. 507 (1948); *Edwards* v. *California*, 314 U.S. 160 (1941).

A survey of the vagrancy legislation of each of the States shows that eight jurisdictions in addition to the District of Columbia have provisions very similar to Subsection 3. Precision of language in vagrancy legislation has been intentionally avoided and, as is shown by the circumstances of the recent enactment of new vagrancy legislation in Minnesota, there is still an inclination to forego any significant attempt to make this language more precise.

The legislative history of the District of Columbia vagrancy statute shows a disquieting disregard for precision of language. The earliest statute was the Act of 1892 which, as amended in 1898, included "all suspicious persons" as vagrants. This was declared unconstitutional in *Stoutenburgh* v. *Frazier,* 16 App. D.C. 229 (1900). In fact, from 1892 until the 1941 revision of the vagrancy laws, all five reported decisions involving these laws resulted in reversals, although only the *Stoutenburgh* decision was based on constitutional grounds. The 1941 revision by Congress produced the present wording of Subsection 3. But the revision became law only after a presidential veto had prevented enactment of an earlier version because of its inclusion of the "idle" as a class of vagrants.

As an aid to understanding Subsection 3, resort has been had to the District of Columbia cases construing it. The rule that penal statutes are to be strictly construed is of little benefit since this only applies when there are a reasonably finite number of possible constructions from which to choose. And the dictionary definition given to the words "immoral" and "profligate" in *Davenport* v. *District of Columbia,* 61 A.2d 486, 488 (D.C. Munic. App. 1948), defines an offense of infinite amplitude. The "limitation" found in other cases that the offense of vagrancy consists of a "pattern of iniquity" rather than an isolated occurrence serves only to compound the uncertainty of Subsection 3 since the prosecution can rely upon the cumulative effect of impressions derived from years of observation. The defendant must be prepared to defend every action and trait of character displayed during his recent past. The statement that the purpose of the vagrancy statute is to "prevent crime" is not helpful as a guide to the language of Subsection 3 since neither judges, police nor citizens can

know with certainty whether or to what extent a particular crime-causing factor amounts to leading an "immoral or profligate" life.

The unlimited breadth of Subsection 3 is condemned by the void-for-vagueness doctrine developed by this Court as an application of the principles of the Due Process Clause. As concisely stated by the Court in *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926), "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, violates the first essential of due process of law . . . ." Moreover, as stated in *Winters* v. *New York*, 333 U.S. 507, 515 (1948), "the standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. . . ."

Several cases decided by this Court bear directly upon the asserted vagueness of the words "immoral or profligate" in Subsection 3. In *Musser* v. *Utah*, 333 U.S. 95 (1948), the majority of the Court stated that a statute prohibiting a conspiracy to do any act "injurious . . . to public morals," "standing by itself, . . . would seem to be warrant for conviction for agreement to do almost any act which a judge or jury might find at the moment contrary to his or its notions of what was good for . . . morals . . . . [The Court would inquire] whether the statute attempts to cover so much that it effectively covers nothing." On remand, the state supreme court answered this inquiry in the affirmative. Similarly, in *Superior Films, Inc.* v. *Department of Educ.*, 346 U.S. 587 (1954) (per curiam) and the companion case of *Commercial Pictures Corp.* v. *Regents*, the Court struck down as unconstitutional Ohio and New York statutes which attempted to define the al-

lowable area of censorship in terms of morality. The cases were decided solely on the authority of *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), which had invalidated a similar statutory use of the word "sacrilegious." Finally, the dissenting opinion of Justice Frankfurter (with Justices Jackson and Burton) in *Winters* v. *New York*, 333 U.S. 507, 520 (1948), and of Justices Black and Douglas in *Edelman* v. *California*, 344 U.S. 357, 362 (1953), have unequivocally, and without conflict with the majority of the Court in those cases, underscored the unconstitutional vagueness of vagrancy laws such as Subsection 3.

"Immoral or profligate life" is such a broadly worded provision that it could well serve as the legal justification for a variety of police abuses, primarily arrest for suspicion. Within the framework of the dictionary definition supplied by the *Davenport* case, *supra*, there is an endless variety of oppressive and illegal, but undeniably real, abuses to which Subsection 3 could give rise. It is submitted that the District of Columbia cannot give the necessary assurance that they would not occur.

Subsection 3 also is invalid because it is broad enough to permit the punishment under it of acts which are protected by the First Amendment. Examples abound of constitutionally protected activities which could well be within its ambit. And Congress was not ignorant of such possibilities as is shown by their inclusion of Section 22-3306 in the District of Columbia vagrancy statutes providing that nothing therein "shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right to picket." Finally, the administrative application of Subsection 3 by the police and its judicial application by the courts require that policeman and judge apply the dictates of their own conscience to the conduct of others

—an exercise of governmental authority which violates the Non-Establishment and Free Exercise of Religion clauses of the First Amendment.

Because of its vagueness and indefiniteness, Subsection 3 is unconstitutional; because of its unconstitutionality, petitioner's conviction under it cannot stand.

ARGUMENT

The Subsection of the Vagrancy Statute (Subsection 22-3302(3)) Under Which Petitioner Was Tried and Convicted Is Unconstitutional Because It Is Too Vague and Indefinite To Provide Sufficient Guidance to Citizens, the Police or the Courts

The section of the vagrancy statute (D.C. Code, Section 22-3302(3) (1961 Ed.)) under which petitioner was arrested, charged, convicted and sentenced, provides in relevant part that:

> "The following classes of persons shall be deemed vagrants in the District of Columbia:
>
> • • • • •
>
> "(3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

Section 22-3303 of the Code further provides that in all prosecutions under Subsection 3 "the burden of proof shall be upon the defendant to show that he has lawful employment or has lawful means of support realized from a lawful occupation or source." This means that in order to make out a prima facie case of vagrancy under Subsection

3 the prosecution need prove only that the defendant was leading "an immoral or profligate life." * If the trial court believes the prosecution's testimony (as it almost invariably will) and thus is satisfied that the defendant has been leading "an immoral or profligate life," and if the defendant is unable to establish that he is lawfully employed or that he has some other lawful source of income, then the defendant can be found guilty and sentenced to pay a fine of up to $300 and/or to serve a term of imprisonment of up to 90 days (D.C. CODE, Section 22-3304 (1961 Ed.)).

As will be fully shown below, this statutory scheme, as written and as construed by the courts, is unconstitutional. Since this is so and since this unconstitutional statute was the sole foundation for petitioner's conviction, it must be set aside.

A. THE HISTORY OF THE VAGRANCY STATUTE DEMONSTRATES ITS PURPOSEFUL IMPRECISION

1) *The Common-Law Inheritance*

Statutes, like people, often can be better understood when viewed in the light of their background. An attempt has, therefore, been made to set out briefly the background of Subsection 3. It will be seen from this history that Sub-

* See Walker v. District of Columbia, 196 A.2d 92, 93 (D.C. App. 1963); Baker v. District of Columbia, 184 A.2d 198, 200 (D.C. Munic. App. 1962); Williams v. District of Columbia, 65 A.2d 924, 925 (D.C. Munic. App. 1949); Clark v. District of Columbia, 34 A.2d 711, 714 (D.C. Munic. App. 1943). The imposition on the defendant of the burden of showing lawful employment or income was held constitutional in Rogers v. District of Columbia, 31 A.2d 649, 652-53 (D.C. Munic. App. 1943). The legislative history of the District of Columbia vagrancy statute makes it quite clear that imposition of this burden was the principal purpose of the legislation. See H.R. REP. No. 1248, 77th Cong., 1st Sess. (1941).

section 3 shares an ancient but tarnished legacy. Because of the peculiar purposes which motivated the enactment of vagrancy laws and because of the class of persons against whom they were directed, precision of language was disregarded or, indeed, avoided by design.*

The sources of vagrancy statutes such as Subsection 3 are to be found in the poor laws of medieval and later England, ". . . those evil statutes of the vile Tutors and sinful Stuarts." (Chief Judge Millard dissenting in *Grenz* v. *State*, 26 Wash. 2d 764, 175 P.2d 633, 640 (1946), *appeal dismissed for failure to file jurisdictional statement*, 332 U.S. 748 (1947).) Under these laws of six centuries ago, both the prices of food and clothing and the wages which could be paid to workmen were regulated. The first thorough-going regulation were the Statutes of Laborers, 23 Edw. 3, c. 1 (1349) and 25 Edw. 3, c. 1 (1350), which confined the laboring population to stated areas within which they could live and fixed wages at specific maximum rates. These were the first laws to make wandering a crime. They were followed by a long series of acts of Parliament suppressing the poor still further in an effort to perpetuate the system of villainage and serfdom. 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 204 (1883). These laws reached their nadir in the Act of 27 Hen. 8, c. 25 (1535),

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* Good sketches of the history of vagrancy legislation, including citations to older studies and authorities, can be found in 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 266-75 (1883); Dubin & Robinson, *The Vagrancy Concept Reconsidered; Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102, 104-107 (1962); Lisle, *Vagrancy Laws: Its Faults and Their Remedy*, 5 J. OF CRIM. L. & CRIMINOLOGY 498-504 (1915); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts In Need of Revision*, 48 CALIF. L. REV. 557-61 (1960); Ledwith v. Roberts [1937], 1 K.B. 232, 245, 254, 267 (C.A. 1936). Much of the following has been taken from these sources without further citation.

which imposed the penalty of execution as a felon upon a person three times convicted of vagrancy.

After a time the emphasis of vagrancy legislation passed from viewing the class against which it was directed as a mass of working chattels which had to be kept from wandering to viewing them as the primary source of potential criminals. This view can be seen in the Slavery Act, 1 Edw. 6, c. 3 (1547), which repealed all the previous poor laws because they were not sufficiently severe. 3 STEPHEN, *op. cit. supra* at 271. Thereafter, the first offense for vagrancy incurred branding with a "V" and being bound in slavery for two years to whomever sought the vagrant's labor. His master was instructed to keep him on bread and water and to refuse him meat. For the second offense, the vagrant was branded on the cheek with an "S" and made a slave for life. The apparent intent of these brandings was to make the offendor easily identifiable. The third offense was punished by the gallows.

In England, it was not until the Vagrancy Act of 1824, 5 Geo. 4, c. 83, that the social purposes of the poor laws and the penal purposes of the vagrancy laws were effectively separated. By 1871, the prevention of crime by the proscription of specifically defined acts of conduct had replaced completely the antiquated concept of punishment based on economic status (The Prevention of Crimes Act, 1871, 34 & 35 Vict., c. 112, § 15). Under the law as it is at present in England, "vagrancy" is no longer anything but a nonsubstantive appellation which by itself describes no punishable offense. At least since *Ledwith* v. *Roberts*, [1937] 1 K.B. 232 (C.A. 1936), vagrancy has been brought into line with the basic philosophy of the criminal law: only acts specifically defined as criminal may be punished.

Although no specific medieval prototype has been found, in conception and application Subsection 3 has in many ways perpetuated the worst features of the vagrancy legislation of the middle ages. And it cannot be supposed that the antiquity of the historical precedents of Subsection 3 excuses whatever injustice may inhere in the statute. The aged proscriptions which formed the basis for Subsection 3 and the rest of the District's vagrancy provisions discredit rather than validate their modern counterparts. They certainly lend no support to them. And so it was held in *Stoutenburgh* v. *Frazier,* 16 App. D.C. 229 (1900). The Court of Appeals for the District of Columbia was there presented with an earlier vagrancy statute which classified as criminals "all suspicious persons." The District attempted to save the statute by showing that its language was similar to that of an early English statute. In holding the statute unconstitutional, the court rejected this contention:

> "In the legislation of England, in regard to the police of that Kingdom, we find a great variety of regulations prescribed from time to time, dating back to the earlier reigns and all those in succession; down to modern times, to meet the requirements of the then existing state of society. But much of that legislation has become obsolete, and, from its severe restrictions upon the liberties of the people, and the cruel and unnatural punishments inflicted, it has long since ceased to be applicable to modern society, and could not at this day be tolerated." (16 App. D.C. at 236)

To the same effect was the decision of this Court in *Winters* v. *New York,* 333 U.S. 507 (1948), where the fact that the statute was sixty years old failed to save it

from an otherwise well-founded constitutional attack. Similarly, in *Edwards* v. *California,* 314 U.S. 160 (1941), this Court held unconstitutional, despite the asserted sanction of Elizabethan poor laws, a California statute which prohibited the importing of indigents into the state.

The specific considerations which have caused courts to resist efforts to justify unconstitutional laws by their hoary antecedents has been well and recently stated in the decision of a Pennsylvania court of intermediate appellate jurisdiction. In *Commonwealth* v. *Franklin,* 172 Pa. Super. 152, 92 A.2d 272 (1952), a Pennsylvania practice of requiring bond from persons acquitted of criminal charges which rested upon almost 600 years of precedent was overthrown on the ground, *inter alia,* of the unconstitutional vagueness of the phrase "not of good fame." With respect to the age of the practice, the court stated:

> "From our consideration of this matter we are of the opinion that the only possible basis for conceding contemporary validity to this 1360 statute is its age and the age of certain ill-considered text comments, a variation of the supposition that 'whatever is is right.' We choose, however, to conclude that civil rights are not lost by historical default; that error compounded by error remains nonetheless error. Age alone certainly does not render a statute invalid. . . . Conversely, however, age alone cannot insulate a statute from attack when in different time and social context and in different constitutional milieu it is in irreconcilable conflict with concepts of individual rights and criminal law." (92 A.2d at 291)

So too, even though Subsection 3 might have been defensible during the middle ages as a necessary preservative for the then existing social and legal order, still if it

is to have continuing validity it must comport with contemporary standards of constitutional precision.

2) *The Present Statutory Situation in the United States*

Unfortunately, the vagrancy laws in most of the jurisdictions in the United States still follow the early English models in that an often ill-defined status is punished because a supposed predilection to criminality has been attached to that status by legislative fiat. See Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 HARV. L. REV. 1203, 1206 (1953). The same must be said of most portions of the District of Columbia statute. See Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1, 6 (1960). Most authorities who have studied the question entertain considerable doubt that this supposed predilection to criminality actually exists and the available studies, although not conclusive, indicate that it does not. See Foote, *Vagrancy-Type Law and Its Administration,* 104 U. PA. L. REV. 603, 626-28 (1956); and the authorities marshalled in Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. REV. 102, 121 (1962).

Despite the severe criticism which has been leveled against the traditional philosophy and wording of vagrancy legislation, however, a review of the vagrancy or vagrancy-type legislation in the fifty States of the Union* shows that indefinite language is the hallmark of vagrancy statutes. In fact, eight states—Alabama, Colorado, Georgia, Mississippi, North Carolina, South Dakota, Texas and Wyo-

* The listing in Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 HARV. L. REV. 1203, 1207 n.17 *et seq.* (1953), must be used with caution as many of the cited provisions have been renumbered, revised, or, more rarely, repealed. A current listing of the relevant statutes appears in Appendix A hereto.

ming—still retain in their statutory definitions of vagrancy a provision very similar to Subsection 3 and in most cases indistinguishable from it. The relevant portions of these statutes are set out in the margin.* It will be seen that the provisions of seven states define vagrants as those who lead an "idle, immoral or profligate" life, while Wyoming's statute speaks of the "immoral or worthless" life. Each of the statutes, as with Subsection 3, apparently exempts those dissipates who possess lawful means of support or lawful employment. And, as is the case with Subsection 3 in the District of Columbia Code, two of these states (Alabama and South Dakota) require by statute that the accused

* ALABAMA: "The following described persons are vagrants: . . . (2) Any person leading an idle, immoral or profligate life, who has no property sufficient for his support, and who is able to work and does not work. . . ." (ALA. CODE tit. 14, § 437(2) (1940)).

COLORADO: "Any person able to work and support himself in some honest and respectable calling who shall be found . . . leading an idle, immoral or profligate course of life . . . shall be deemed a vagrant . . . ." (COLO. REV. STAT. ANN. § 40-8-19 (1963)).

GEORGIA: "Vagrants are— . . . 2. Persons leading an idle, immoral, or profligate life, who have no property to support them and who are able to work and do not work." (GA. CODE ANN. § 26-7001(2) (1935)).

MISSISSIPPI: "The following persons are and shall be punished as vagrants, viz.: . . . (b) Persons leading an idle, immoral or profligate life, who have no property to support them, and who are able to work and do not work." (MISS. CODE ANN. § 2666 (1942)).

NORTH CAROLINA: "If any person shall come within any of the following classes, he shall be deemed a vagrant . . . 2. Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work." (N.C. GEN. STAT. § 14-336(2) (1953)).

SOUTH DAKOTA: "A vagrant is an idle person, having no legitimate means of support, who does not seek or desire lawful employment, and who subsists through charity of others or by unlawful means. Whenever it shall, in a prosecution under this

discharge the burden of showing that he possesses lawful means of support or is lawfully employed.*

It is apparent then that the problems presented by the broad and general sweep of the language of Subsection 3 are not problems peculiar to the District of Columbia. It is true that certain states—including California, Illinois and Maryland (see Appendix A hereto)—recently have taken constructive steps toward eliminating these problems. But other states have done nothing or, as in one known instance, have intentionally perpetuated these problems.

The one instance where the problems of wording a vagrancy statute were acknowledged but left unsolved occurred in Minnesota. In 1963, the Advisory Committee to the Interim Commission on Juvenile Delinquency, Adult Crime and Corrections reported to the Legislature of the State of Minnesota a recommended criminal code. The present Section 609.725 of the Minnesota Statutes, the pro-

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section, be shown that any person who is able to work: . . . (2) Leads an idle, immoral, or profligate life and does not work; . . . it shall constitute a prima facie presumption that such person is a vagrant as defined in this section." (S. D. CODE § 13.1324(2) (1939)).

TEXAS: "The following persons are and shall be punished as vagrants, viz.: . . . (2) Persons leading an idle, immoral or profligate life, who have no property to support them, and who are able to work and do not work." (TEX. PEN. CODE ANN. art. 607(2) (Vernon 1952)).

WYOMING: "Any person able to support himself in any respectable calling, who shall be found within the limits of this state without any visible means of support, and living an immoral or worthless life, shall be deemed a vagrant . . . ." (WYO. STAT. ANN. § 6-221 (1957)).

* See ALA. CODE tit. 14, § 439 (1940) (prosecution need show only "that such defendant is leading an idle, immoral, or profligate life, and that such defendant is able to work . . . "). The same is apparently the meaning of S. D. CODE § 13.1424 (1939), quoted in the preceding footnote, although no reported case has yet construed this provision.

vision defining vagrancy, was part of the recommended Code and became law without change. (Minn. Laws 1963, c. 753, Criminal Code of 1963).* The comment on the vagrancy section by the distinguished Advisory Committee contains an extraordinarily candid and informative statement of the purpose of that section. Though of some length, the comment merits quotation in full:

> "Ever since the breakdown of the feudal system, Anglo-American society appears to have had its residue of persons not fitting into the social structure. Though able, they do not work, do not want to work, have no family ties, belong to no neighborhood, live on what is discarded by others or by theft or begging, and often move from one locality to another. They are the inhabitants of skid row.
>
> "The laws on vagrancy have been developed to deal with this class of persons. Such laws have existed from about the 14th century and a peculiar characteristic of them has been that they punish being such a person rather than an act committed by him. Hence such phrases as 'lives in idleness,' 'without visible means of support,' 'unable to give a good account of himself,' etc.

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* The definitions of "vagrants" as enacted in MINN. STAT. ANN. § 609.725 (West 1964) are:

> "(1) A person, with ability to work, who is without lawful means of support, does not seek employment, and is not under 18 years of age; or
>
> "(2) A person found in or loitering near any structure, vehicle, or private grounds who is there without the consent of the owner and is unable to account for his presence; or
>
> "(3) A prostitute who loiters on the streets or in a public place or in a place open to the public with intent to solicit for immoral purposes; or
>
> "(4) A person who derives his support in whole or in part from begging or as a fortune teller or similar imposter."

"This offense has usually been made a misdemeanor. Since these persons seldom can pay fines, punishment has consisted in confinement in the workhouse, frequently suspended on condition of getting out of town.

"For the police, such laws have several advantages:

"(1) Testimony that the defendant has been observed loitering, gives a confused account of himself, and is not working, is sufficient for conviction.

"(2) It permits arrest for this offense when the real objective is to get information about other and more serious crimes.

"(3) It permits pressure on this group to keep them from getting too large or too obnoxious without the necessity of waiting until evidence of a specific crime is obtained.

"(4) The defendant may be suspected of some offense which cannot be proved: the charge of vagrancy permits punishment nevertheless.

"It has been said that without this offense the police would be at a serious handicap in dealing with this class of persons.

"See 23 California L. Rev. 616, which is a reply to 'Who is a vagrant in California?' by a municipal judge.

"Perkins, The Vagrancy Concept, 1958, 9 Hastings L. Jr. 237, 252, states:

"'In metropolitan centers . . . the vagrancy law is one of the most effective weapons in the arsenal of law enforcement, and if the officer's use of this weapon should be seriously impaired, the security of the citizen would be grievously weakened.'

"Nevertheless, the use of the vagrancy laws is subject to serious abuse by the police. These laws are usually couched in broad terms and conviction will usually follow on testimony of the police officer stated in equally broad terms. The defendants are usually ignorant, unable effectively to explain their position if they have any, are unable to employ counsel and are, therefore, pretty much at the mercy of the police.

"Courts, no doubt, feel under some compulsion to accept the testimony of police or risk permitting these individuals to get out of hand.

"This is undoubtedly a crude device for getting at a very deep social problem and consists of little more than attempts at repression rather than solution.

"It is believed that a program leading to a more effective solution cannot be undertaken in this revision.

"The alternative is, therefore, to state the law on the premises of the present statutes, confining them to specified limits and stating them with as much clarity as the subject permits." (Quoted in MINN. STATS. ANN. vol. 40A, ff. § 609.725, at 68-69 (1964).)

In other words, vagrancy statutes in the main are designedly written in broad and all-inclusive terms so as to facilitate the conviction of vaguely undesirable persons who have committed no crime—or at least cannot be convicted of a specific crime in the regular manner with proper proof—but who for some reason have aroused the suspicions or annoyed attention of the police. Such purposes would appear to be well served by Subsection 3's blanket condemnation of "leading an immoral or profligate life." And, as will be seen, the legislative history pertaining specifically to Subsection 3 rouses the strong suspicion that Congress in-

tended to serve these purposes through the use of imprecise language in Subsection 3 and throughout the vagrancy statute.

3) *Legislative History of the District's Vagrancy Statute*

Turning then to vagrancy legislation specifically applicable to the District of Columbia, one encounters the earliest statute in the Act of July 29, 1892, ch. 320, 27 Stat. 323. In separate phrases, that law punished as criminal such persons as those "who have no visible means of support" or who "lead a notoriously lewd or lascivious course of life" and included "persons who are likely to become chargeable to the District of Columbia as paupers." The statute was amended by the Act of July 8, 1898, ch. 638, 30 Stat. 723, which was most noteworthy for its inclusion of "all suspicious persons" as vagrants. The inclusion of "all suspicious persons" was immediately challenged and was struck down as void and unconstitutional in the landmark case of *Stoutenburgh* v. *Frazier*, 16 App. D.C. 229 (1900). In his opinion for the court in the *Stoutenburgh* case, Chief Justice Alvey was forced to conclude that the District of Columbia vagrancy law was "more arbitrary than the English statute" of 1824 (16 App. D.C. at 237). Sixty-five years after the Chief Justice wrote, the main force of this criticism is, unhappily, still applicable to the District vagrancy law.

Congress responded to the *Stoutenburgh* decision by replacing the old statute with an act which is found as a rider to the D.C. Appropriation Act for 1909, ch. 250, 35 Stat. 711. The general tenor of the Act is made clear by its initial definition of "vagrants" as "idle persons who, not having visible means of support, live without lawful em-

ployment." Having summarily disposed of the unemployed in general, the Act proceeded to another category:

> "All persons leading an idle, immoral, or profligate life who have no property to support them and who are able of body to work and do not work, including all able-bodied persons without other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife, or minor child or children."

This 1909 legislation marked the debut of "idle, immoral, or profligate life" as the description of a criminal status in the District.

In dealing with prosecutions brought under the statutes of 1892, 1898 and 1909, the courts of the District of Columbia apparently were quite reluctant to permit the punishment of defendants under them. Every one of the five reported cases under the Acts of 1898 and 1909 resulted in a reversal. *Stoutenburgh* v. *Frazier*, 16 App. D.C. 229 (1900); *Fields* v. *District of Columbia*, 26 App. D.C. 70 (1905); *Fleming* v. *District of Columbia*, 34 App. D.C. 5 (1909); *Lewis* v. *District of Columbia*, 51 App. D.C. 221 (1922); and *Rose* v. *District of Columbia*, 51 App. D.C. 222 (1922). Despite the glaring defects in the vagrancy law, the Act of 1909 remained in force without amendment until 1941. See D.C. Code tit. 6, § 291 (1930 Ed.); D.C. Code § 22-3301 (1941 Ed.).

On July 30, 1941, a bill to redefine the crime of vagrancy in the District of Columbia was introduced in the House of Representatives. The complete text of the bill is set out in 87 Cong. Rec. 7081 (1941). The bill contained the present wording of Subsection 3 which was not altered at any point during the legislative process. The bill also defined a vagrant as, among other things, "any able-bodied person

who *lives in idleness"* upon the charity of another, and as "any person *leading an idle life"* who had no lawful source of income or employment and who failed to give "a good account of himself." (Emphasis supplied.) Apparently believing that this and other language in the vagrancy bill posed a threat to the legitimate activities of labor unions, the sponsors of the bill tacked on the proviso that "nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right to picket." (87 CONG. REC. 7081)*

The bill was enacted in this form by both Houses of Congress and sent to the President for his signature. 87 CONG. REC. 7494. President Roosevelt vetoed the bill, however, on the grounds that the phraseology used in the bill ". . . does not conform with accepted standards of legislative practice as a definition of a criminal offense. . . ." Veto Message of the President, 87 CONG. REC. 7576 (1941). The matter was considered further by Congress and a new bill was passed which deleted the "idle" as a class of vagrants. The Act became law and today it is found in Sections 22-3302 to 22-3306 of the District of Columbia Code.

4) *Judicial Construction of Subsection 3*

The legislature and the executive having acted, control over the administration of Subsection 3 passed mainly to the courts of the District of Columbia. And, while "judicial safeguards do not neutralize the vice of a vague law," *Baggett* v. *Bullitt,* 377 U.S. 360, 373 (1964), nonetheless, it has also been stated on occasion that a narrowing judicial

* The proviso was ultimately enacted as part of the vagrancy statute even though the "idleness" language was excised before the statutes became law. The proviso now appears as D.C. CODE § 22-3306 (1961 Ed.). See discussion at 48-49, *infra.*

construction may save an otherwise indefinite statute "as so construed." See, *e.g., United States* v. *Alford,* 274 U.S. 264 (1929); see also *Cramp* v. *Board of Pub. Instruction,* 368 U.S. 278, 285 (1961), and cases cited. But even if the judicial glosses on the text of Subsection 3 are considered in testing its constitutionality, they would not save it. They have done little, if anything, to impart the minimum of precision which due process requires and in some instances have made the subsection even looser.

Narrow Construction. We start, of course, with the proposition that "the vagrancy statute, because it defines a crime, must be construed narrowly in favor of the defendant. . . ." *Harris* v. *District of Columbia,* 251 F.2d 913, 914 (D.C. Cir. 1958), *reversing* 132 A.2d 152 (D.C. Munic. App. 1957). But this "canon of construction" applies to all penal statutes and it has no special utility when applied to Subsection 3. It is particularly inapposite when the inquiry relates to the statute's vagueness, for here the question is not whether Subsection 3 should bear one or the other of two possible constructions but whether it can be meaningfully construed at all. The words of Subsection 3 are so indefinite that one can never confidently predict whether a particular act will or will not be held to be encompassed within them. This is especially true in light of the broad and all-inclusive fashion in which the words of Subsection 3 have been defined.

Dictionary Definition. On occasion, resort has been had to dictionary definitions in an attempt to ascertain whether a phrase has a commonly understood meaning. For example, see the prodigious collection of dictionary definitions compiled in the concurring opinion and appendix of Justice Frankfurter in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 507 at 523-28, 533-40 (1952). A modest survey

has been conducted with respect to the words "immoral" and "profligate" and the dictionary entries consulted are listed in Appendix B hereto. These entries, which are believed to be representative, comport with what was said in *Davenport* v. *District of Columbia*, 61 A.2d 486, 488 (D.C. Munic. App. 1948). In the opinion in the *Davenport* case, the court attempted to assign meaning to the words "immoral" and "profligate" by referring to the definitions given in the second edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY and in *Schuman* v. *Pickert*, 277 Mich. 225, 269 N.W. 152, 154 (1936), from which the court in part quoted:

> "Webster's Dictionary defines 'profligate' as 'completely given up to dissipation and licentiousness; broken down in morals and decency.' It has been said that '"Immorality" is not necessarily confined to matters sexual in their nature; it may be that which is contra bonos mores; or not moral, inconsistent with rectitude, purity, or good morals; contrary to conscience or moral law; wicked; vicious; licentious, as an immoral man or deed. Its synonyms are: Corrupt, indecent, depraved, dissolute; and its antonyms are: Decent, upright, good, right . . . .' We have no doubt that the evidence furnished ample support for the finding of the trial court that Davenport came within those definitions and thus was leading an immoral or profligate life." (Footnotes omitted.)

When it is considered that the court was construing the words of a statute which can be and is used daily to send persons to jail for terms as long as three months, it is difficult to believe that this definition could bear analysis. Analysis, not incidentally, was not given that definition by the Court of Appeals in its opinion below which stated only

that the words "immoral or profligate life" ". . . were defined in a general way by this court in *Davenport* v. *District of Columbia* [*supra*], and we see no occasion to repeat or elaborate upon that definition. . . ." In fact, the attempted definition in *Davenport* is merely a collection of equally vague synonyms and antonyms which, in at least two important respects, have even broadened the coverage of Subsection 3. It might have been supposed that "immoral" could have been confined to matters of sexual perversion, but *Davenport* states that it "is not necessarily confined to matters sexual in their nature." It also might have been supposed that the determination of what is "immoral" would be made as nonsubjective as possible, but *Davenport* says that this is to be determined by what is "contrary to conscience or moral law."

It is submitted that a fair and frank reading of the *Davenport* definition shows conclusively why Subsection 3 is incurably vague. If it remains the authoritative interpretation of Subsection 3—continuing to authorize police and courts to imprison persons whose lives are found to be not "decent, upright, good, right"—then no statute can be vague or indefinite.

Pattern of Iniquity. Another purported limitation on the powers of the police and trial courts was enunciated in *Coley* v. *District of Columbia,* 177 A.2d 889, 891 (D.C. Munic. App. 1962):

> ". . . It is settled that vagrancy consists of a continued course of immorality, a pattern of iniquity, rather than a solitary instance of wrongdoing. . . ." (Footnote omitted.)*

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* The "pattern of iniquity" rule has also been applied in Hunt v. District of Columbia, 47 A.2d 783 (D.C. Munic. App. 1946),

This limitation, of course, does go to the meaning of "immoral or profligate." But its sole contribution is to require that the prosecutor allege and prove that the acts of the accused were more than an isolated occurrence. The police of the District of Columbia have interpreted this to mean that the prospective accused should have been subjected to three "observations" before an arrest is made under Subsection 3.* But the limitation does nothing to clarify the meaning of Subsection 3. In fact, it has precisely the opposite effect.

While there are instances in which the "pattern of iniquity" rule has been applied to reverse a vagrancy conviction under Subsection 3 because the evidence showed only an isolated occurrence, *e.g., Drew* v. *District of Columbia,* 187 A.2d 325 (D.C. App. 1963), it also has been invoked to justify the admission of "background" or "character" evidence which is said to demonstrate the continuing nature of the accused's vagrancy. See, *e.g., Coley* v. *District of Columbia,* 177 A.2d 889, 891 (D.C. Munic. App. 1962). Thus, an accused must now come to court prepared to defend the "morality and rectitude" of his entire recent life. For example, the information filed against petitioner in the present case charged that on the "19th day of May," 1963, petitioner "was then and there and still is a vagrant

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affirmed, 82 D.C. App. 159, 163 F.2d 833 (1947) (joinder of defendants improper: "A condition personal to a given individual is not the same as a condition personal to another even though each such condition is evidenced by particulars of conduct described in the same words." 163 F.2d at 836); and Drew v. District of Columbia, 187 A.2d 325 (D.C. App. 1963).

* Letter from Metropolitan Police Chief John B. Layton to Mr. David Carliner, Chairman of the National Capital Area Civil Liberties Union, dated March 26, 1965. The text of the letter is set out in Appendix C hereto.

. . .," and continued with a minimal recitation of the charges of immorality and profligacy. The specific acts or traits of petitioner's existence which could be relied upon to prove his vagrancy could have been taken from any point in time during the period from May 19 through June 12, 1963, the day he was arrested and charged. In order to defend against the charge, therefore, petitioner would have had to be prepared to explain to the satisfaction of the police court judge any such act or trait which appeared—or which was said to have appeared—during this time. See, *e.g., Coley* v. *District of Columbia,* 177 A.2d 889 (D.C. Munic. App. 1962), where the brief observations which were held to supply adequate evidence for conviction were made on March 26, 1960; June 4, 1960; November 26, 1960; and January 28, 1961. It is rare indeed that the typical vagrancy defendant would be prepared to counter such a showing.

Prevention of Crime. In *Clark* v. *District of Columbia,* 34 A.2d 711, 713 (D.C. Munic. App. 1943) (conviction under § 22-3302(1)), speaking of the vagrancy statute as a whole, the court stated that:

> "Our statute, like other vagrancy statutes, is in the nature of a police regulation to prevent crime, and was enacted for the enforcement of good order and public safety. . . . The statute must be construed in light of the purpose for which it was enacted, namely, to prevent crime. . . ." (Footnotes omitted.)*

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* See also District of Columbia v. Hunt, 82 App. D.C. 159, 163 F.2d 833, 835 (1947), *affirming* 47 A.2d 783 (D.C. Munic. App. 1946); Harris v. District of Columbia, 192 A.2d 813, 816 (D.C. App. 1963).

The statement in Drew v. District of Columbia, 187 A.2d 325, 326 (D.C. App. 1963), quoted with approval in Golden v. District of Columbia, 210 A.2d 2, 4 (D.C. App. 1965), that evidence of

As noted in the opinion in the *Clark* case, 34 A.2d at 712 n.3, the House Report accompanying the bill which became the present vagrancy statute also stated that "The measure as drafted is directed primarily to persons who are potentially a menace to the community." (H.R. REP. No. 1248, 77th Cong., 1st Sess. (1941)).

The meaning of this appears to be that Subsection 3 makes criminal the leading of a life which may lead to crime. But it cannot seriously be maintained that this "limitation" imposes any operable boundaries to the words "immoral or profligate." Even if it is supposed that each judge administering Subsection 3 is fully conversant with the theory and practice of effective crime prevention (a supposition belied at least by the current frustration over the mounting rate of crime), it does not follow that citizens who would obey the law would possess the same wisdom so as to avoid (if they could) the type of "immoral or profligate" life which any judge thinks will lead to crime. Moreover, many of the commonly recognized causes of crime defy control by persons subjected to them. Poverty, membership in certain minority groups, lack of education, poor housing, insufficient parental control, and many other factors lead to crime. Does Subsection 3 forbid the leading of lives in which these factors appear? If so, must it be shown that the defendant has wilfully led such a life? If not, do these factors excuse an "immoral or profligate" life? Where social scientists differ as to the causative nature of these attributes, which school of thought is to be followed? It is submitted that the prevention-of-crime limi-

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vagrancy consists in "a course of conduct or mode of living or status prejudicial to the public welfare . . .," seems to relate to the same purpose of crime prevention, etc., mentioned in the *Clark* case, *supra*.

tation raises more questions than it answers. It is not an effective limitation on the scope of Subsection 3.

B. The Void-for-Vagueness Doctrine Condemns as Unconstitutional the Standard "Immoral or Profligate Life" in Subsection 3.

The question that remains is whether, in the light of its history and judicial explication, the words of Subsection 3 possess the clarity required by the principles of due process embodied in the void-for-vagueness doctrine.

It should first be noted that the constitutional problems in Subsection 3 and other vagrancy statutes have not led to extensive appellate challenge precisely because of the condition of the class of persons against which they are directed. See Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons,* 59 Yale L.J. 1351, 1357 n.21 (1950). The constitutionality of Subsection 3 itself has not been determined prior to this case. The Court of Appeals of the District of Columbia has stated in its opinion in this case below that "in at least two instances this court has held the act in question to be constitutional," citing *Thomas* v. *District of Columbia,* 161 A.2d 52 (D.C. Munic. App. 1960); and *Rogers* v. *District of Columbia,* 31 A.2d 649 (D.C. Munic. App. 1943). The only relevant portion of the *Thomas* opinion stated that:

> "Appellant's second point is that the statute under which she was prosecuted is unconstitutional. This question was not raised at trial and is not properly before us. If it were, we would have no hesitation in ruling that the point is without merit." (161 A.2d at 53)

This manifestly is no answer to the present petitioner's objections. There is no indication whether the same subsection of the vagrancy statute or the same constitutional grounds were being considered. In any event, the court expressly declined to pass upon the unmentioned issues and its concluding elliptical remark can at most be only dictum. The *Rogers* decision is also entirely inapposite. While the conviction in that case was obtained under Subsection 3, the only constitutional objections presented or decided upon concerned what are now Sections 22-3303 and 11-616 of the District of Columbia Code which deal with the burden of proof and the right to a jury trial. The present petitioner's attack is directed against Subsection 3 itself, the constitutionality of which has never before now been decided by any court.*

1) *The Doctrine and Its Rationale*

The test used by the Federal courts to determine whether particular statutory language is or is not void because of its indefiniteness has been concisely set out in the leading case of *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926):**

> "That terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render

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* It also appears that the constitutionality of the other "immoral-profligate-worthless" vagrancy statutes discussed above has never been authoritatively determined. An excellent discussion of constitutional litigation involving other vagrancy statutes can be found in Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102, 121-33 (1962).

** The precise configurations of the void-for-vagueness doctrine have been carefully examined in Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. . . ."

This doctrine and its rationale are familiar to the courts of the District of Columbia, despite the impression which might have been created by the decisions below. As long ago as 1905, the Court of Appeals of the District of Columbia expounded these principles in the following statement which has lost none of its vitality by the passage of time:

"In all criminal prosecutions the right of the accused to be informed of the nature and cause of the accusation against him is preserved by the 6th Amendment. In order that he may be so informed by the indictment or information presented against him, the first and fundamental requisite is that the crime or offense with which he stands charged shall be defined with reasonable precision. He must be informed by the law, as well as by the complaint, what acts or conduct are prohibited and made punishable. In the exercise of its power to regulate the conduct of the citizen, within the constitutional limitations, and to declare what shall constitute a crime or punishable offense, the legislature must inform him with reasonable precision what acts are intended to be prohibited. 'Every man should be able to know with certainty when he is committing a crime.' United States v. Reese, 92 U.S. 214, 220, 23 L. ed. 563,

> 565. This obvious duty must be performed by the legislature itself, and cannot be delegated to the judiciary. It may, doubtless, be accomplished by the use of words or terms of settled meaning, or which indicate offenses well known to and defined by the common-law. Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible. But when the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite as that it may embrace within its comprehension, not only acts commonly recognized as reprehensible, but others also which it is unreasonable to presume were intended to be made criminal, the courts, possessing no arbitrary discretion to discriminate between those which were and those which were not intended to be made unlawful, can do nothing else than declare the statute void for its uncertainty. *United States* v. *Reese,* 92 U.S. 214, 221, 23 L. ed. 563, 566. As was said in that case: 'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.'" *Czarra* v. *Board of Medical Supervisors,* 25 App. D.C. 443, 450-51 (1905).

The court in *Czarra* was faced with the question of the constitutionality of a statute permitting the revocation of a license to practice medicine because of "unprofessional or dishonorable conduct." In the course of striking down

the statute because of its vagueness, the court enunciated the following standard for testing such legislation:

> "Doubtless all intelligent and fair-minded persons would agree in the opinion of the board of medical supervisors that the act charged against the appellant in the case at bar amounted to conduct both unprofessional and dishonorable. But this is not the test of the validity of the particular clause of the statute. The underlying question involved in all cases that may arise is whether the courts can uphold and enforce a statute whose broad and indefinite language may apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts." (25 App. D.C. at 453)

Still another instance of the use of this doctrine by the District of Columbia courts is *United States* v. *Capital Traction Co.*, 34 App. D.C. 592 (1910). There the court held unconstitutionally vague an Act of Congress which made it a misdemeanor for a street railway to fail to operate a "sufficient number" of cars to prevent "crowding." It should be noted that although *Capital Traction* was a criminal case, the statute only provided for a fine, and *Czarra,* upon which the court relied so heavily, was only a civil proceeding. Thus the constitutional demands articulated by these cases must be viewed all the more stringently in the context of the instant case which involves a statute providing for imprisonment as well as a fine. As stated by this Court in *Winters* v. *New York,* 333 U.S. 507, 515

(1948): "... The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement...."

The same passage in the *Winters* decision continues with an instructive delineation of the types of vagueness which may infect a statute (333 U.S. at 515-16):

> "... The crime 'must be defined with appropriate definiteness,' *Cantwell* v. *Connecticut*, 310 U.S. 296; *Pierce* v. *United States*, 314 U.S. 306, 311. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, *Lanzetta* v. *New Jersey*, 306 U.S. 451, or in regard to the applicable tests to ascertain guilt." (Footnotes omitted.)

So measured, the vice of the words "any person leading an immoral or profligate life" in Subsection 3 is two-fold. They neither tell what persons are subject to arrest nor do they supply a reasonably ascertainable standard of guilt. They are words to which meaning can be assigned only by means of a totally subjective appeal to judgment. They are verbal symbols, to use the language of semanticists, which have no external object-referents. See Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 91 (1960). They are words which no court decision has been able to clarify because by their very nature they demand that the prejudices and moral predilections of each individual be employed to supply meaning in any particular case.

2) *Judicial Authority Bearing Directly on Subsection 3*

It has already been seen that the veil of uncertainty which enshrouds the words "immoral or profligate" is not lifted—but is, in fact, made still more impenetrable—by an examination of the legislative and judicial history of Subsection 3. Nor is anything else available to advance understanding of their meaning. It is true, of course, that words may have more precise significance in one context than in another. *Winters* v. *New York,* 333 U.S. 507, 518 (1948). And if the words in question can be said to have a well-recognized and long-standing specific interpretation based either upon their well-established usage and understanding in the common law or upon their settled meaning in a technical field, then mere surface ambiguity will not cause such words to be void because of their vagueness. See *Champlin Ref. Co.* v. *Corporation Comm'r,* 286 U.S. 210, 242-43 (1932). But these guides to meaning are of no avail for the attempted validation of Subsection 3. Its area of operation is plainly not a technical field where widespread and carefully controlled usage might supply the meaning which the words themselves lack. It is just as plain, as has already been seen, that the common-law history sheds no light. And the available judicial authority quite clearly requires the rejection of such indefinite words as standards by which to judge the criminality of conduct.

Preeminent among these authorities is *Musser* v. *Utah,* 333 U.S. 95 (1948). In *Musser,* the appellants, members of a religious sect which practiced and advocated polygamy, had been convicted in the state courts of violating Utah Code Ann. § 103-11-1(5) (1943). This law made it a crime to conspire "to commit any act injurious . . . to public

morals . . . ." * During the oral argument in this Court, inquiries by the Court suggested that a question existed as to whether the quoted words were not unconstitutionally vague. Reargument directed to this specific issue was had upon the request of the state and this Court determined that the issue was such that the Utah Supreme Court should first pass upon it. In the course of its opinion directing remand, the Court characterized the "public morals" statute as follows (333 U.S. at 96-97):

> "It is obvious that this is no narrowly drawn statute. We do not presume to give an interpretation as to what it may include. Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge or jury might find at the moment contrary to his or its notions of what was good for . . . morals . . . . [We would inquire] whether the statute attempts to cover so much that it effectively covers nothing. Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. . . . Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."

In light of these words, the Utah Supreme Court on remand unanimously held that the statute was unconstitutionally vague and reversed the convictions, *Musser* v. *State,* 118 Utah 540, 223 P.2d 193, 194 (1950), stating that:

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* This section of the Utah statute has not been repealed since and is found now at UTAH CODE ANN. § 76-12-1(5) (1953). No further attempt to apply the subsection has apparently been made.

> " . . . The argument before this court has developed no reason why we should believe that the legislature intended, in using this language, that it should be limited to a meaning less broad than the words therein used would indicate in their ordinary sense. No language in this or any other statute of this state or other law thereof or any historical fact or surrounding circumstance connected with the enactment of this statute has been pointed to as indicating that the legislature intended any limitation thereon other than that expressed on the face of the words used. We are therefore unable to place a construction on these words which limits their meaning beyond their general meaning. The conviction of the defendants thereunder cannot be upheld. This part of the statute is therefore void for vagueness and uncertainty under the Fourteenth Amendment to the Federal Constitution."

In addition to the *Musser* case, this Court in *Superior Films, Inc.* v. *Department of Educ.*, 346 U.S. 587 (1954) (per curiam), has unanimously held unconstitutional a motion picture censorship statute (OHIO GEN. CODE § 871-49) which attempted to prohibit the licensing of any film which, in the opinion of the board of censors, was not "of a *moral,* educational or amusing and harmless character." (Emphasis supplied.) A companion case, *Commercial Pictures Corp.* v. *Regents,* (No. 274), decided together with the *Superior Films* case, held unconstitutional that portion of Section 122 of the NEW YORK EDUCATION LAW which permitted the banning of films which were "immoral" or which "tended to corrupt morals." Both cases were decided solely on the authority of *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952). In *Burstyn,* the Court had held that the portion of Section 122 of the NEW YORK EDUCATION LAW which

permitted the banning of "sacrilegious" films was unconstitutional as a prior restraint on the freedoms of speech and press. The Court was especially plain-speaking in its views of the meaning of "sacrilegious" as that term had been defined by the state courts:

> "New York's highest court says there is 'nothing mysterious' about the statutory provision applied in this case: 'It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . .' This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. . . . " (343 U.S. at 504-05).*

If the Court in *Burstyn* found the term "sacrilegious" too indefinite, it certainly must be understood to have concluded the same thing in *Superior Films* and in *Commercial Pictures* with respect to the terms "moral" and "immoral." For, as already seen, morality covers such a vast area that sacrilege, expansive as that term may be of itself, would be lost within it.

Two other separate pronouncements by members of this Court, although not speaking for the Court as a whole,

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* See also the concurring opinion of Justice Frankfurter, 343 U.S. at 518 *et seq.*

are strongly persuasive of the unconstitutional vagueness of Subsection 3. It will be noted that in neither of these instances were these views of the individual Justices in disagreement with the views of a majority of the Court. In each instance, consideration of the vagueness issue either was not thought by the majority to be necessary to its decision or was disposed of in a manner that certainly would have encompassed the individual views expressed.

First in point of time is the dissenting opinion of Justice Frankfurter, joined by Justices Jackson and Burton, in *Winters* v. *New York,* 333 U.S. 507, 520 (1948). The majority of the Court had struck down a New York statute which made criminal the possession of certain magazines " . . . principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime. . . . " The dissenting Justices would have held this statute constitutional. In his dissenting opinion, Justice Frankfurter set out his views on the standards for determining whether a statute was unconstitutionally vague. In fact, his proposed standard (which has never been accepted by a majority of the Court) was so self-limiting that two commentators have expressed the view that its adoption would have made the void-for-vagueness doctrine inapplicable in all but the extraordinary case. Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. Rev. 102, 122 n.116 (1962). Nonetheless, there were certain cases where the doctrine (under this stricter standard) would still have been applicable. Within this dissenting opinion Justice Frankfurter sought to distinguish the cases upon which the majority opinion had relied and his comments with respect to one case involving a vagrancy-type statute are especially pertinent:

"Only a word needs to be said regarding *Lanzetta* v. *New Jersey,* 306 U.S. 451. The case involved a New Jersey statute of the type that seek to control 'vagrancy.' *These statutes are in a class by themselves, in view of the familiar abuses to which they are put.* See Note, 47 Col. L. Rev. 613, 625. *Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.* In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." (333 U.S. at 540) (Emphasis supplied.)

These words of Justices Frankfurter, Jackson and Burton do not stand alone. Justices Black and Douglas firmly scored the unconstitutional vagueness of the typical vagrancy statute in *Edelman* v. *California,* 344 U.S. 357, 362 *et seq.* (1953) (dissenting opinion). The majority did not reach the merits of the constitutional questions presented since they found that there were adequate non-constitutional grounds for affirming the state court. Justices Black and Douglas dissented on the ground that there was no valid, independent basis for the action of the state court. They thus reached the merits of the statute's constitutionality.

Edelman, who was a street orator of the radical left, had been arrested and convicted of vagrancy under Section 647 (5) of the California Penal Code. The statute provided that "every idle, or lewd, or dissolute person, or associate of known thieves" was a vagrant subject to the penalty of fine and/or imprisonment. The dissenting Justices noted

(344 U.S. at 364) the marked similarity between the California statute and the New Jersey statute struck down in *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939). (The further similarity between both these state statutes and Subsection 3 is also obvious.) During Edelman's trial, the trial judge had instructed the jury as to the meaning of the word "dissolute" in the vagrancy statute by quoting from the dictionary. (Compare the equally dubious dictionary definition given by the court as the meaning of "immoral or profligate" in *Davenport* v. *District of Columbia,* 61 A.2d 486, 488 (D.C. Munic. App. 1948).) Commenting upon this dictionary definition, the dissenting Justices stated that:

> ". . . The dictionary definition of dissolute given to the jury by the court described a crime of such nebulous amplitude that no person could know how to defend himself. . . ." (344 U.S. at 365)

In conclusion, the dissenting Justices condemned the California statute as unconstitutional because of its fatal vagueness and indefiniteness. Their words in this respect are as applicable to Subsection 3 of the District of Columbia Code as they were to Subsection 647(5) of the California Code:

> "It would seem a matter of supererogation to argue that the provision of this vagrancy statute on its face and as enforced against petitioner is too vague to meet the safeguarding standards of due process of law in this country. . . ." (344 U.S. at 365)

Events have vindicated the views of Justices Black and Douglas. The former vagrancy provisions of Cal. Pen. Code § 647 (West Ann. 1955), under which the *Edelman* case arose, were repealed by Cal. Stats. 1961, c. 560, § 1.

One of the most notable omissions from the new CAL. PEN. CODE § 647 (West Ann. Supp. 1964) which was added by Cal. Stats. 1961, c. 560, § 2, to replace the old vagrancy provisions, is the subsection they had found to be constitutionally objectionable. See generally, Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 CALIF. L. REV. 557 (1960). In California, therefore, the problems which gave rise to the *Edelman* dissent have now been put to rest. They live on in Subsection 3.

The *Edelman* case and the vagrancy provision involved in it—which is not at all unlike the provision in question here—have been commented upon by Professor Amsterdam in his definitive note on *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 91 n.120 (1960), in the following words:

> "... It may be suggested that *Edelman* represents in a single disquieting image all of the evils which justify the constitutional void-for-vagueness doctrine. Here is the coercive force of society run loose at the whim of prosecutor and jury, without adequate restraint at the level of the trial court (for want of standards by which to restrain), enforced against indigent and unrepresented defendants unable to assure in their own defense the adequate preservation of a trial record or the rulings of the court on their federal issue, unlikely—even if a federal issue should be raised—to know or be able to take that issue to a federal court."

This description could just as aptly be applied to Subsection 3. If the term "dissolute" is an inadequate standard, then "immoral or profligate" certainly is. If the defendant in *Edelman* was indigent and unrepresented, so is virtually every person processed by means of Subsection 3

through the Criminal Division of the District of Columbia Court of General Sessions. For most defendants in such a police court, any meaningful form of trial record is rarely preserved.* Appeal is difficult, expensive, vexatious and time-consuming even in the rare case where it is attempted. These circumstances effectively insulate the police court from appellate guidance or scrutiny and make even more critical the necessity for adequate standards of determining whether a vagrancy offense has occurred.

3) *Evils Resulting from the Vagueness of Subsection 3*

It cannot seriously be gainsaid that vaguely written vagrancy statutes such as Subsection 3 have given rise to police abuses which in many instances are a scandal to the Constitution. These objectionable practices customarily include at least the following:

1. Arrest for vagrancy can be employed as a legal justification for detention on suspicion alone when the real objective is to gather information about other crimes the suspect may have committed.

2. If a person is suspected of having already committed another crime which cannot be proved, the vagrancy charge can be used to "punish" the suspect.

3. The vague words can be stretched or relaxed, as needed, in order to incarcerate or otherwise institutionalize persons not otherwise subject to legal process but whom police and magistrate believe should be removed from the body of the public.

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* There is no provision in statutory law or in the Rules of the District of Columbia Court of General Sessions requiring a written transcript or statement of the evidence in a prosecution for vagrancy in the District. If the defendant wishes a transcript, he must have it prepared at his own expense.

4. Where lax court practices permit, the police may employ the vagrancy statute to vindicate supposed affronts which do not amount to abuse of an officer or a similar, statutorily defined offense.

The widespread existence of these and similar practices is undeniable. They have been reliably and elaborately documented.*

Who can say with certainty that abuses such as these would never be perpetrated in the over-burdened police courts of the District of Columbia? Even were the risk comparatively remote, the Constitution should not be held to countenance putting citizens to this risk. The very purpose of the Due Process Clause would seem to be to ensure that citizens will be secure in their persons and in their possessions from the excesses and abuses of governmental authority. Respondent would assure the Court that these abuses, whatever might be their prevalence in other jurisdictions, never occur in the District of Columbia. Respondent in the past has labeled them as pure conjecture supported by no fact of record. But the complete answer to such assurances was given by this Court only a year ago in *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964), where, in response to a similar contention by another governmental authority, the Court replied:

" . . . It may well be correct, but the contention only emphasizes the difficulties with the two statutes; for

* See, *e.g.*, Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102 (1962); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950), and the numerous authorities cited in each.

> if the oaths [which the statutes required] do not reach some or any of the behavior suggested, what specific conduct do the oaths cover? *Where does fanciful possibility end and intended coverage begin?*" (Emphasis supplied.)

Examples of possible police abuses and excesses are also suggestive of another, related ground upon which it must be said that Subsection 3 is void for vagueness. This Court has often said that a statute violates the Due Process Clause of the Fourteenth Amendment if it is so vague and indefinite that it permits the punishment of acts which are within the protection of the First Amendment. See *Winters* v. *New York,* 333 U.S. 507, 509 (1948); *Stromberg* v. *California,* 283 U.S. 359, 369 (1931); *Herndon* v. *Lowry,* 301 U.S. 242, 258 (1937). Indeed, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech." *Smith* v. *California,* 361 U.S. 147, 150-51 (1959). And since *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), it is undisputed that the Due Process Clause of the Fifth Amendment imposes at least the same restrictions upon the federal government as the Due Process Clause of the Fourteenth Amendment imposes upon the states. As this Court stated in *Bolling,* " . . . it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." (347 U.S. at 500) It follows, therefore, that if the statutory words "immoral or profligate life" used by Congress in Subsection 3 are so vague and indefinite that they permit the punishment of acts which are protected by the First Amendment, then the statute violates the Due Process Clause of the Fifth Amendment.

Freedom of Speech and Freedom of Assembly. By way of illustration, the language of Subsection 3 is broad enough

to permit the arrest and conviction of a member of the American Nazi Party who is peaceably giving a speech on the beliefs of that organization. But *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); and *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), make it clear that if the speech does not incite to violence, the speaker would have a clear right under the First Amendment to speak unhindered. His arrest and conviction under Subsection 3 would violate that right. This, of course, is only one of many examples which could be supposed of possible violations of constitutionally protected freedom of speech by the use of Subsection 3.

Suppose again that a meeting of an extreme racist group were held to discuss peaceful ways to further their cause. Again, a policeman and a judge might believe that the advocacy of racial hatred was "immoral" under the dictionary definition given in *Davenport* v. *District of Columbia*, 61 A.2d 486, 488 (D.C. Munic. App. 1948). In good faith they could thus arrest and convict the participants for vagrancy. Cases such as *Hague* v. *C.I.O.*, 307 U.S. 496 (1939), however, are clear in their teaching that such a use of governmental power would violate the participants' constitutionally protected freedom of assembly.

There is clear proof in the legislative history of the District of Columbia vagrancy statute that these possibilities cannot be dismissed as imaginary. While many of the details unfortunately are not available, there apparently was some confusion in Congress over the scope of the District of Columbia vagrancy statute before it was finally enacted. On August 13, 1941, H.R. 5448 was brought before the House of Representatives for a vote. Just before the vote was taken, however, the sponsor of the measure, Congressman Schulte, tacked onto the bill the following proviso:

> "Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right to picket." (87 CONG. REC. 7081)

This same language is found as Section 6 of the act which ultimately became law (see 55 Stat. 810) and has been codified as Section 22-3306 of the District of Columbia Code.* This proviso is at least a tacit admission by Congress that the statute was written in broad and all-inclusive language without any significant attempt to delineate carefully the types of conduct which were to be prohibited in the first place. This was why it had proved necessary to rescue from the statute's broad sweep a certain class of persons—the members of organized labor who, unlike those at whom the statute is now generally directed, were capable of mounting an effective objection to the possibility of police interference with their legitimate activities. By itself, the proviso furnishes a complete answer to any argument that Congress intended to use anything but the most imprecise language or that Congress had a specific, narrowly limited set of factual situations in mind when the law was enacted.

Freedom of Religion. Perhaps the most serious vice inherent in the vagueness of Subsection 3 is the fact that its great breadth permits—in fact, requires—the police and the courts to employ their own notions of religious morality and ethics in determining which persons and conduct are subject to the statute.

The concept of "immoral" conduct is pregnant with religious meanings of various significance for different per-

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* Compare the section of the Alabama vagrancy statutes (ALA. CODE tit. 14, § 440 (1940)) which expressly provides that they "shall not apply to persons who are idle because of strikes or lockouts."

sons. The varieties of this religious significance are obvious from the definition given in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d Ed.) which was paraphrased by the local appellate court in *Davenport* v. *District of Columbia*, 61 A.2d 486, 488 (D.C. Munic. App. 1948):

> "Not moral; inconsistent with rectitude, purity, or good morals; *contrary to conscience or moral law;* wicked; vicious, licentious; as an immoral man or deed. Syn.: Corrupt, indecent, depraved, dissolute. Cf. Bad. Ant.: Decent, upright, good, right. See Moral." (Emphasis supplied.)

The emphasized phrase "contrary to conscience or moral law" epitomizes the dual constitutional vice in the statutory langauge. On the one hand, the statute refers the policeman and the judge to their own consciences for the standard of judgment. Their consciences, and only their consciences, become the law, and of course it is impossible for those who would attempt to obey the law to anticipate what will be the conscientious dictates of individual policemen and judges. On the other hand, a policeman or judge who recognizes the arbitrariness implicit in imposing his own moral predilections upon the public must rely instead upon some exterior moral system or code which he can feel is objective and fairly consistent. But here again there are many vastly different moral codes, and by the very act of choosing one over others the policeman or judge is making one system compulsory for all citizens who come within his jurisdiction.

This is a constitutionally objectionable "establishment of religion" in a pristine form. The fact that recent cases such as *Engel* v. *Vitale*, 370 U.S. 421 (1962) (Regents' prayer); and *Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (bible reading), have dealt with the exteriors of

religion and not with basic religious doctrine does not obscure the obvious fact that compulsory religious exercises are proscribed because they may easily lead to compulsory religious dogma. This is clear from a reading of the recent cases. Thus, in the *Abington Township* v. *Schempp* case, *supra* at 217-18, this Court cited with approval the language of Justice Roberts in *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940), discussing the interrelationship of the Establishment and Free Exercise Clauses:

> " . . . On the one hand, *it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship.* Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. . . . " (Emphasis supplied.)

Nor does the fact that it is possible under Subsection 3 to have a proliferation of moral codes—each policeman and each judge choosing his own—avoid the constitutional prohibition. The contention is rejected summarily in *Abington Township* v. *Schempp*, *supra* at 216:

> " . . . [T]his Court has rejected unequivocally the contention that the establishment clause forbids only governmental preference of one religion over another. Over twenty years ago in . . . [Everson v. Board of Education, 330 U.S. 1, 15 (1947)] . . . the Court said that '[n]either a state nor the Federal government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.*'" (Emphasis supplied.)

In short, whether it be supposed that policemen and judges of the District of Columbia are imposing their own

religious standards or those of someone else when they enforce Subsection 3, the result is the same. Citizens are being involuntarily subjected to religion. Thus to deny their freedom of religion is unconstitutional.

Conclusion

Subsection 3, which forms the sole basis for petitioner's conviction, is unconstitutional under the void-for-vagueness doctrine. Petitioner prays, therefore, that the order of the United States Court of Appeals for the District of Columbia Circuit denying his petition for allowance of an appeal be set aside, and that that court be directed to reverse the judgments of the courts below.

Respectfully submitted,

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APPENDIX A

State Vagrancy Legislation

A statutory definition of vagrancy appears in D. C. CODE § 22-3302 (1961 Ed.) and in the statutes of 40 states: ALA. CODE tit. 14, § 437 (1940); ALASKA STAT. ANN. § 11.60.210 (Michie 1962); ARIZ. REV. STAT. §§ 13-991–13-993 (1956); ARK. STAT. ANN. §§ 41-4301, 41-4303 (1964); COLO. REV. STAT. ANN. § 40-8-19 (1963); CONN. GEN. STAT. § 53-340 (1958); DEL. CODE § 11-881 (1953); FLA. STAT. § 856.02 (1941); GA. CODE ANN. § 26-7001 (1935); HAW. REV. LAWS § 314-1 (1955) (continued in force by HAW. CONST. Art. XVI, § 2 HAW. REV. LAWS (Supp. 1964)); IDAHO CODE ANN. § 18-7101 (1948); IND. ANN. STAT. § 10.4602 (Burns 1956); IOWA CODE ANN. § 746.1 (1950), as amended (Supp. 1964); KAN. STAT. ANN. § 21-2409 (1964); KY. REV. STAT. § 436.520 (1963); LA. REV. STAT. ANN. § 14:107 (Supp. 1964); MASS. GEN. LAWS c. 272, § 66 (West 1959); MINN. STAT. ANN. § 609.725 (West 1964); MISS. CODE ANN. § 2666 (1942); MO. REV. STAT. § 563.340 (1949); MONT. REV. CODE ANN. § 94-35-248 (1947); NEB. REV. STAT. § 28-1119 (1943); NEV. REV. STAT. § 207.030 (1963); N. M. STAT. ANN. § 40A-20-5 (1963); N. Y. CODE CRIM. PROC. § 887; N. C. GEN. STAT. § 14-336 (1953); N. D. REV. CODE § 12-42-04 (1943); OKLA. STAT. tit. 21, § 1141 (1951); ORE. REV. STAT. § 166.060 (1963 Repl. Part); PA. STAT. ANN. tit. 18, § 2032 (1963); S. C. CODE § 16-565 (1962); S. D. CODE § 13.1424 (1939); TENN. CODE ANN. § 39-4701 (1956); TEX. PEN. CODE ANN. art. 607 (Vernon 1952); UTAH CODE ANN. § 76-61-1 (1953); VT. STAT. ANN. tit. 13, § 3901 (1958); VA. CODE § 63-338 (1950); WASH. REV. CODE § 9.87.010 (1951); WIS. STAT. § 947.02 (1955); WYO. STAT. ANN. § 6-221 (1957).

The following states have statutes punishing offenses under other names which are commonly known as vagrancy in the states listed above: ME. REV. STAT. c. 137, § 41 (Cum. Supp. 1963); N. H. REV. STAT. ANN. § 570:25 (Supp. 1963); N. J. STAT. ANN. §§ 2A:170-1, -2, -4 (1953); R. I. GEN. LAWS

§ 11-45-1 (Supp. 1962) and §§ 11-2-1, 11-34-5, 11-45-3, 11-45-10 1956).

Michigan's "disorderly persons" statute, MICH. STAT. ANN. § 28.364 (1962), includes "vagrants" but under other descriptions also lists persons who would be within the definition of vagrancy in many of the other states.

In Ohio, municipalities are expressly given the power to punish "vagrancy," OHIO REV. CODE ANN. § 715.55(b) (1953).

West Virginia does not mention vagrancy in its statutes.

In California, the former vagrancy provisions in CAL. PEN. CODE § 647 (West. Ann. 1955) were repealed by Cal. Stats. 1961, c. 560, § 1. The new CAL. PEN. CODE § 647 (West Ann. Supp. 1964) was added by Cal. Stats. 1961, c. 560, § 2. It prohibits only specific acts—not general conduct or status—under the denomination of "disorderly conduct." In addition, CAL. PEN. CODE § 647a (West Ann. Supp. 1964) continues the description of "vagrant" for a person committing the specific act of annoying or molesting a child under eighteen years or of loitering about schools. See Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts In Need of Revision,* 48 CALIF. L. REV. 557 (1960), which proposed the new legislation in substantially its enacted form.

Illinois' vagrancy statute, ILL. ANN. STAT. c. 38, § 578 (1935), was repealed by ILL. ANN. STAT. c. 38, § 35-1 (Smith-Hurd 1964), known as the Criminal Code of 1961, and was not replaced.

Maryland's vagrancy statute, MD. ANN. CODE GEN. LAWS art. 27, §§ 664, 665 (1951), was repealed by Laws 1953, c. 411, and not replaced.

APPENDIX B

Representative Dictionary Entries for "Immoral" and "Profligate"

WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d Ed. 1961):

"Immoral"—not moral: inconsistent with purity or good morals: contrary to conscience or moral law: wicked, licentious (an—man) (such—acts); broadly: opposed to, critical of, or in conflict with generally or traditionally held moral principles. . . .

"Profligate"—adj. 1. completely given up to dissipation and licentiousness: abandoned to vice and corruption: shamelessly immoral; 2. wildly extravagant: criminally excessive in spending or using: recklessly wasteful.

FUNK & WAGNALLS STANDARD DICTIONARY (International Edition 1958):

"Immoral"—adj. 1. violating the moral law; contrary to rectitude or public morality. 2. habitually licentious. . . . Synonyms: bad, corrupt, criminal, depraved, dishonest, dissolute, evil, loose, profligate, sinful, unprincipled, vicious, vile, wicked, wrong. See bad, criminal, sinful. Antonyms: chaste, devout, dutiful, godly, good, just, moral, pious, pure, religious, righteous, upright, virtuous, worthy.

"Profligate"—adj. 1. lost or insensible to principle, virtue, or decency; abandoned to vice. 2. recklessly extravagant; in great profusion. . . . See synonyms under immoral.

BALLENTINE'S LAW DICTIONARY (1948 Ed.):

"Immoral"—Hostile to the welfare of the general public; having a tendency to mischievous or pernicious consequences.

"Profligate"—no entry.

RADIN'S LAW DICTIONARY (1955):

"Immoral"—contrary to the accepted standards of moral conduct, whether illegal or not; obscene, indecent. It is used

most frequently of illicit sex relations, but is much broader in scope, applying also to contracts which are void because of immoral consideration. Double-dealing and over-reaching, even when not amounting to fraud, are characterized as immoral. Schuman v. Pickert, 277 Mich. 225, 269, N. W. 152.

"Profligate"—no entry.

BLACK'S LAW DICTIONARY (4th Ed. 1957):

"Immoral"—contrary to good morals; inconsistent with the rules and principles of morality; inimical to public welfare according to the standards of a given community, as expressed in law or otherwise. Exchange Nat. Bank of Fitzgerald v. Henderson, 139 Ga. 260, 77 S. E. 36, 37, 51 L. R. A. (N.S.) 549. Morally evil; impure; unprincipled; vicious; or dissolute. U.S. v. One Book, Entitled "Contraception," by Marie C. Stopes, D.C.N.Y., 51 F.2d 525, 527.

"Profligate"—no entry.

OXFORD ENGLISH DICTIONARY (1961 Reprint):

"Immoral"—a. The opposite of moral; not moral. 1. Not consistent with, or not conforming to, moral law or requirement; opposed to or violating morality; morally evil or impure; unprincipled, vicious, dissolute. (Of persons, things, actions, etc.) 2. Not having a moral nature or character; non-moral. Obs. rare.

"Profligate"—A. adj. I. 1. Overthrown, overwhelmed, routed. Obs. II. 2. Abandoned to vice or vicious indulgence; recklessly licentious or debauched; dissolute; extremely or shamelessly vicious. b. Recklessly prodigal, extravagant, or profuse.

WORLD BOOK ENCYCLOPEDIA DICTIONARY (1963 Ed.):

"Immoral"—adj. 1. morally wrong; wicked: Lying and stealing are immoral. 2. lewd; unchaste.

"Profligate"—adj 1. very wicked; shamelessly bad: a profligate wretch without any sense of principle, morality, or religion (Tobias Smollett). 2. recklessly extravagant.

APPENDIX C

Letter From Metropolitan Police Chief John B. Layton to David C. Carliner of the National Capital Area Civil Liberties Union

DISTRICT OF COLUMBIA

METROPOLITAN POLICE DEPARTMENT

March 26, 1965

Mr. David Carliner,
Chairman, National Capital Area
Civil Liberties Union,
Suite 803, 1101 Vermont Avenue, N.W.
Washington, D. C. 20005

Dear Mr. Carliner:

I have for acknowledgment your letter requesting further information relative to vagrancy arrests under Title 22, Section 3302 of the District of Columbia Code.

Statistics for the Fiscal Year 1964, indicate that the Precincts with the highest incidence of arrests for vagrancy, are the First, Second and Thirteenth. These three Precincts, along with the Tenth, record the highest incidence of Part I Criminal Offenses.

Precincts One, Two and Thirteen have been co-operating in the enforcement of the Vagrancy Statutes as it was found that persons under observation frequented all three Precincts. Co-ordination of effort has recently been extended to the Tenth Precinct area. This co-operation consists of an exchange of information and observations concerning activities of persons who attract police attention.

Precinct Commanding Officers, particularly those of the Precincts listed above, keep abreast of court decisions relating to vagrancy arrests and when a decision indicates a change in existing practices, they immediately bring it to the attention of the members of their Unit at one of the training sessions held at the Precinct level.

Successful prosecution of a charge of vagrancy usually depends on the number of observations made and type of evidence developed. The restrictions on making such observations are reflected under "Notes to Decisions", Title 22, Section 3302 of the District of Columbia Code as amended by Supplement VI, which is used as a guide in instruction to our personnel.

The usual number of observations to be made on each Paragraph of the Vagrancy Statute are as follows:

Paragraph one (persons known to be pickpockets, thieves, burglars, felons, etc.) An arrest can be made on one observation.

Paragraph two has been repealed.

Paragraph three (any person leading an immoral or profligate life, who has no lawful employment . . .) This Section is usually used in the suppression of prostitution, particularly the lone, unemployed female operating as a prostitute. In this type of case at least three observations are usually necessary.

Paragraph four (any person who keeps, operates, frequents, lives in, or is employed in any house or other establishment of ill fame . . .) This Paragraph is used primarily for the suppression of prostitution in disorderly houses and establishments of ill fame and at least three observations are usually necessary.

Paragraph five through nine require a minimum of five observations and, depending on the circumstances, we have made as many as fifteen observations before an arrest was made.

Trusting that this information will be of assistance, I am

Yours very truly,

/s/ John B. Layton
John B. Layton
Chief of Police.

JBL:H:m

APPENDIX D

Text of Statutes Involved

DISTRICT OF COLUMBIA CODE (1961 Ed.):

§ 22-3302. Vagrants defined.

The following classes of persons shall be deemed vagrants in the District of Columbia:

(1) Any person known to be a pickpocket, thief, burglar, confidence operator, or felon, either by his own confession or by his having been convicted in the District of Columbia or elsewhere of any one of such offenses or of any felony, and having no lawful employment and having no lawful means of support realized from a lawful occupation or source, and not giving a good account of himself when found loitering around in any public park, highway, public building, or other public place, store, shop, or reservation, or at any public gathering or assembly.

(2) Repealed. June 29, 1953, 67 Stat. 97, ch. 159, § 209.

(3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source.

(4) Any person who keeps, operates, frequents, lives in, or is employed in any house or other establishment of ill fame, or who (whether married or single) engages in or commits acts of fornication or perversion for hire.

(5) Any person who frequents or loafs, loiters, or idles in or around or is the occupant of or is employed in any gambling establishment or establishment where intoxicating liquor is sold without a license.

(6) Any person wandering abroad and lodging in any grocery or provision establishment, vacant house, or other vacant building, outhouse, market place, shed, barn, garage,

gasoline station, parking lot or in the open air, and not giving a good account of himself.

(7) Any person wandering abroad and begging, or who goes about from door to door or places himself in or on any highway, passage, or other public place to beg or receive alms.

(8) Any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself.

(9) And all persons who by the common law are vagrants, whether embraced in any of the foregoing classifications or not.

§ 22-3303. Prosecutions—Burden of proof to show lawful employment.

In all prosecutions under paragraphs 1 or 3 of section 22-3302 the burden of proof shall be upon the defendant to show that he has lawful employment or has lawful means of support realized from a lawful occupation or source.

§ 22-3304. Penalty—Conditions imposed by court.

Any person convicted of vagrancy under the provisions of sections 22-3303 to 22-3306 shall be punished by a fine of not more than $300 or imprisonment for not more than ninety days, or by both such fine and imprisonment, in the discretion of the court. The court may impose conditions upon any person found guilty under the aforesaid provisions and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed. Conditions thus imposed by the court may include submission to medical and mental examination, diagnosis, and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may

deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant. The director of public health of the District of Columbia, the Women's Bureau of the Police Department, the Board of Public Welfare, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant.

§ 22-3306. Right to strike or picket not abrogated.

Nothing in sections 22-3302 to 22-3306 shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right to picket.

LIBRARY

IN THE

Supreme Court of the United States

October Term, 1959

No. 51

ERNEST J. HOUSE, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT

CHARLES H. GRAY,
Corporation Counsel, D. C.
MILTON D. KORMAN,
Principal Assistant Corporation Counsel, D. C.
HUBERT B. PAIR,
Assistant Corporation Counsel, D. C.
[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 51

EDDIE J. HICKS, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (R. 12-15) is reported at 197 A. 2d 154. The United States Court of Appeals for the District of Columbia Circuit [1] rendered no opinion, but its orders (1)

[1] The United States Court of Appeals for the District of Columbia Circuit will be referred to hereafter as the Court of Appeals.

"Denying Allowance of Appeal," (2) "Denying Petition for Reconsideration En Banc" of denial of petition for allowance of appeal and (3) "Vacating and Reentering Order Denying Petition for Reconsideration En Banc" appear in the transcript of record at pages 17, 28-29 and 33-34, respectively.

JURISDICTION

The order of the division of the Court of Appeals denying an appeal from the judgment of the District of Columbia Court of Appeals was entered April 28, 1964 (R. 17). The order of the Court of Appeals "Denying Petition for Reconsideration En Banc" was entered June 15, 1964 (R. 28-29). The order of the Court of Appeals "Vacating and Reentering Order Denying Petition for Reconsideration En Banc" was entered October 26, 1964 (R. 33-34). The petition for writ of certiorari was filed November 25, 1964, and was granted February 1, 1965. Petitioner has invoked the jurisdiction of the Court under 28 U. S. C. § 1651 (a) (1958) [2] and urges that, on the authority of *Heflin* v. *United States*, 358 U. S. 415 (1959), the petition for writ of certiorari was timely for purposes of Supreme Court Rule 22 (2). Because, in the view of respondent, the petition for writ of certiorari was not filed within the time prescribed by Supreme Court Rule 22 (2), the Court is without jurisdiction either under 28 U. S. C. § 1651 (a) (1958) or under 28 U. S. C. § 1254 (1) (1958).

STATUTES INVOLVED

United States Code, Title 28, Chapter 81,
Section 1254 (1958). *Courts of Appeals; Certiorari****.

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[2] It does not appear from the transcript of record that petitioner either sought or was granted, pursuant to Supreme Court Rule 31 (1), (2), and (4), leave to file a petition for the issuance by the Court of the common law writ of certiorari authorized by 28 U. S. C. § 1651 (a) (1958).

Act of December 23, 1963, P. L. 88-241, Section 1, 77 Stat. 479, 612, 613; D. C. Code §§ 11-321, 17-101, 17-104 (Supp. IV, 1965).

RULES OF COURT INVOLVED

Rules of the Supreme Court of the United States,
Rule 22 (2). *Review on Certiorari—Time for Petitioning.*
Rule 31 (1) and (2). *Procedure on Applications for Extraordinary Writs.*

Rules of the United States Court of Appeals for the District of Columbia Circuit Governing Review of Cases from the District of Columbia Court of Appeals,
Rule 1. *Character of Cases which May be Considered.*
Rule 9. *Entry of Orders Allowing or Denying Appeal.*
Rule 10. *Reconsideration.*

The text of the pertinent provisions of the statutes and rules of court involved are set forth in the appendix hereto.

QUESTIONS PRESENTED

The Court of Appeals, on June 15, 1964, entered an order denying reconsideration en banc of its denial of an appeal from the judgment of the District of Columbia Court of Appeals in a vagrancy case. On motion of petitioner filed more than 75 days thereafter, the Court of Appeals, on October 26, 1964, entered an order vacating and reentering, as of that date, such order of June 15, 1964. The questions presented are:

1. Did the Court of Appeals, by the simple expedient of vacating its order entered June 15, 1964, and reentering such order as of October 26, 1964, enlarge the time prescribed by Supreme Court Rule 22 (2) within which to petition the Court for writ of certiorari?

2. Assuming the jurisdiction of the Court, is there a judgment or decree of the Court of Appeals, respecting the constitutionality of the District of Columbia Vagrancy Act, reviewable by this Court on writ of certiorari?

3. Absent any showing of the facts and circumstances surrounding petitioner's arrest and conviction for vagrancy, is there any basis for a determination that, as applied to petitioner, the District of Columbia Vagrancy Act is vague and indefinite and, therefore, void under the due process clause of the Fifth Amendment?

4. Is the District of Columbia Vagrancy Act so vague and so indefinite that it is unconstitutional on its face?

STATEMENT OF THE CASE

Petitioner was found guilty in the District of Columbia Court of General Sessions on an information charging him with being a vagrant in violation of D. C. Code § 22-3302 (1961), which defines a vagrant as: "* * * (3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source" (R. 3-4). As permitted by D. C. Code § 22-3304 (1961), imposition of sentence was suspended (R. 4).

On various alleged constitutional grounds, petitioner moved for arrest of judgment and moved also for a new trial (R. 5-7). The motions were denied (R. 8), and petitioner appealed to the District of Columbia Court of Appeals (R. 9), which affirmed the judgment of conviction (R. 12-15). Following the denial of a motion for rehearing (R. 15), petitioner petitioned the Court of Appeals for allowance of an appeal from the judgment of the District of Columbia Court of Appeals (R. 16).

On April 28, 1964, a division of the Court of Appeals entered an order denying allowance of an appeal (R. 17). Within the time permitted by Rule 10 of the Rules Governing Review of Cases from the District of Columbia Court of Appeals (App., *infra,* p. 4), petitioner, with

the supporting affidavit of his counsel, petitioned the Court of Appeals for reconsideration en banc of the denial of an appeal. In both the petition and in the affidavit, it was urged, among other things, that a copy of the District's [3] brief in opposition to the petition for allowance of an appeal "* * * was never received by either Petitioner or Amicus or their attorneys * * *" (R. 18-26). On June 15, 1964, the Court of Appeals en banc entered an "Order Denying Petition for Reconsideration En Banc" (R. 28-29).

On September 1, 1965, more than 75 days after the entry of the order denying rehearing en banc, petitioner lodged with the Court of Appeals a motion entitled "Motion of Petitioner to Vacate and Reenter Order" which, on October 26, 1964, was permitted to be filed. It was represented in the motion that, due to excusable neglect occasioned by counsel's unfamiliarity with the Rules of the Supreme Court governing review on writs of certiorari "* * * in criminal cases arising from United States Courts of Appeals, * * *" the "* * * attorney for petitioner-movant failed to prepare and file a petition for certiorari within the special 30-day limitation period provided, in Rule 22 (2) of the Supreme Court's Rules * * *" (R. 31). It was then urged in behalf of petitioner that:

> "In order therefore, to cure the procedural mistake which presently precludes review by the Supreme Court under its Rule 22 (2), it is respectfully requested that this Court vacate its order of June 15, 1964, and reenter that order contemporaneously with the granting of this motion" (R. 31).

The Court of Appeals, on October 26, 1964, entered an "Order Vacating and Reentering Order Denying Petition For Reconsideration En Banc" (R. 33-34), and, within 30 days thereafter, petitioner filed in this Court a petition

[3] Respondent will be referred to herein as the District.

for writ of certiorari which, on February 1, 1965, was granted.

SUMMARY OF THE ARGUMENT

Whether granted pursuant to 28 U. S. C. § 1254 (1) (1958) or 28 U. S. C. § 1651 (1958), the Court is without jurisdiction because the petition for a writ of certiorari was not filed within the time prescribed by Supreme Court Rule 22 (2). From this it follows that the writ of certiorari was improvidently granted and should, for that reason, be dismissed;[4] and this is true even if this is a case in the Court of Appeals for purposes of 28 U. S. C. § 1254 (1) (1958).

Since the Congress has established the conditions of appellate review of cases originating in the District of Columbia Court of General Sessions, absent any showing of the special and unusual circumstances which warrant the exercise of the Court's discretionary power to issue the common law writ of certiorari, 28 U. S. C. § 1651 (1958) is clearly without application.

But more than this, there has been no judgment of the Court of Appeals on any issue respecting the constitutionality of the District of Columbia Vagrancy Act. Consequently, no judgment has been brought here by the record in this case which the Court may properly review on writ of certiorari.[5]

---

[4] As the Court said in *Forsyth* v. *Hammond*, 166 U.S. 506, 511 (1897):

> "* * * This contention involves two matters: First, the question of power, and second, that of propriety. It may be that the question of propriety should be considered as foreclosed by the action of the court in awarding the writ of certiorari, but the question of power, being one of jurisdiction, is always open, and must whenever presented be considered and determined."

[5] The District of Columbia Court of Appeals, although created by Act of Congress, is not a court "of the United States" within the Federal Judicial System, as defined by 28 U. S. C. A. § 451 (Supp. 1964), nor is it the highest court of a state in which decision could be had for purposes of 28 U. S. C. § 1257 (1958), and the Congress has not provided for a review of its judgments or decrees by the Supreme Court. Cf. Supreme Court Rule 62, which declares that, for purposes of Supreme Court Rules, the term "state court" includes the Supreme Court of Puerto Rico.

In any event, the District of Columbia Vagrancy Act is not unconstitutional because of vagueness or uncertainty either as applied to petitioner or on its face. Rather, the statute is reasonably definite, clear and precise, and it proscribes conduct in words so well understood that no man of common intelligence is required to speculate as to their meaning.

ARGUMENT

I.

Because the petition was not filed within the time prescribed, the Court is without jurisdiction, and the writ of certiorari should be dismissed.

Presented at the outset is the question of the jurisdiction of the Court to review this case on writ of certiorari. As nearly as can be determined, the writ has been granted to review the action of the Court of Appeals in denying discretionary review of a judgment of the District of Columbia Court of Appeals. It is apparently conceded that such action of the Court of Appeals was in exercise of jurisdiction conferred by Pub. L. 88-241, § 1, 77 Stat. 479, 613, D. C. Code §§ 11-321, 17-104 (Supp. IV, 1965) (App., *infra*, p. 1).

Petitioner apparently also concedes, as he must, that, on the authority of *Ferguson* v. *District of Columbia*, 270 U. S. 633 (1926), this is not a case "in the Court of Appeals" for purposes of review on writ of certiorari under 28 U. S. C. § 1254 (1) (1958) (Petitioner's brief, p. 2). And, as the District will hereafter demonstrate, this case is not reviewable on writ of certiorari under any section of the Judicial Code.

Assuming, however, *arguendo*, that an order of the Court of Appeals denying discretionary review of a judgment of the District of Columbia Court of Appeals is reviewable by this Court on writ of certiorari, the District

respectfully submits that the Court is wholly without jurisdiction to review the order here involved.

A. The petition for writ of certiorari was not, for purposes of 28 U. S. C. § 1254 (1) (1958), timely filed.

Upon the face of the record, it is almost too clear for discussion that, for purposes of 28 U. S. C. § 1254 (1) (1958), the petition for writ of certiorari was not filed within the time prescribed by Supreme Court Rule 22 (2).

The order denying reconsideration en banc of the denial of the petition for allowance of an appeal was entered June 15, 1964 (R. 28, 29). The motion "• • • To Vacate and Reenter, • • •" filed more than 75 days thereafter, complained of no ambiguity in the order denying reconsideration en banc, asked for no reconsideration of such order, and sought no change in any matter of substance involved therein (R. 30, 32). Significantly enough, the order of the Court of Appeals granting the motion "• • • To Vacate and Reenter • • •" neither disturbed nor revised, in any manner of substance, the legal rights and obligations which, by the order of June 15, 1964, were settled with finality.

What stands uncontroverted in the record is that the sole purpose of the motion "• • • To Vacate and Reenter • • •" and the order of the Court of Appeals granting such motion was to rejuvenate an extinguished right to petition this Court for a writ of certiorari. Cf. *Allegrucci* v. *United States*, 372 U. S. 954 (1963). In the motion to vacate and reenter, it was said in this connection:

> "In order therefore, to cure the procedural mistake which presently precludes review by the Supreme Court under its Rule 22 (2), it is respectfully requested that this Court vacate its order of June 15, 1964, and reenter that order

contemporaneously with the granting of this motion" (R. 31).

It is now well settled by decisions of this Court that the time within which to petition the Court for a writ of certiorari cannot be enlarged by the simple expedient of entering in the court below an order granting a motion, filed many days beyond the time prescribed by Supreme Court Rule 22 (2), urging some action which has no effect on the merits of the decision or decree sought to be reviewed.

Thus, in *F. T. C.* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206, 210-212 (1952), a writ of certiorari was dismissed upon a showing that application therefor was filed more than 90 days after the entry of the order sought to be reviewed. In that case, the Court of Appeals for the Seventh Circuit entered, on July 5, 1951, a judgment reversing Part III of a three-part cease and desist order of the Federal Trade Commission. The court, however, made no disposition of the Commission's cross-petition for the enforcement of all parts of such order. Long after the expiration of the 15-day period prescribed for filing petitions for rehearing, the Commission, by memorandum, represented to the court that no disposition had been made of the cross-petition, and urged the court to "'• • • make and enter • • • a decree affirming Parts I and II of the Commission's order to cease and desist'" and commanding obedience thereto. On September 18, 1951, the court issued what it termed its final decree by which Part III of the Commission's order was again reversed. The court then affirmed Parts I and II and entered a judgment providing for the enforcement thereof.

Within 90 days thereafter, the Commission petitioned the Supreme Court for a writ of certiorari which was granted. In compliance with the Court's request that counsel discuss the timeliness of the application for the writ, it was urged that, when a court actually changes its

judgment, the time to petition begins to run anew and that the court in this case had changed its judgment. This Court did not agree, and, in dismissing the writ, no doubt as improvidently granted, said:

> "While it may be true that the Court of Appeals had the power to supersede the judgment of July 5 with a new one, it is also true, as that court itself has recognized, that the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged. Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." [Footnotes omitted.] *Id.* at 211-212.

To the same effect was *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942). There, after final judgment of the New York Court of Appeals, a remittitur was amended by adding to it a statement that a federal question was presented and necessarily passed upon. Within 90 days after the amendment of the remittitur, but more than 90 days after the entry of the final judgment, petition was made to the Supreme Court for a writ of certiorari. Rejecting the contention that the amendment of the remittitur had the effect of extending the time to apply for certiorari, the Court denied the petition, saying:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not

> whether under local rules of practice the judgment is denominated final * * *, but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review * * * (see *Gorman* v. *Washington University,* 316 U. S. 98). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established." *Id.* at 268.

See also: *Allegrucci* v. *United States,* 372 U. S. 954 (1963); *United States* v. *Robinson,* 361 U. S. 220 (1960); *Matton Co.* v. *Murphy,* 319 U. S. 412 (1943); cf. *Wolfsohn* v. *Hankin,* 376 U. S. 203 (1964); *Harris Lines* v. *Cherry Meat Packers,* 371 U. S. 215 (1962); *Thompson* v. *I. N. S.,* 375 U. S. 384 (1964); *F. P. C.* v. *Idaho Power Co.,* 344 U. S. 17 (1952); *Market Street R. Co.* v. *Railroad Com. of Cal.,* 324 U. S. 548 (1945).

It is, of course, an undeniable fact that the order of the Court of Appeals in this case denying reconsideration en banc of the denial of an appeal from the judgment of the District of Columbia Court of Appeals was not challenged in any manner by the motion to vacate and reenter such order (R. 30-32). Under the circumstances, the order granting the motion to vacate and reenter could not have enlarged, and did not enlarge, the 30-day period prescribed by Supreme Court Rule 22 (2) (App., *infra,* p. 2). Cf. *Wayne Gas Co.* v. *Owens. Co.,* 300 U. S. 131 (1937); *Market Street R. Co.* v. *Railroad Com. of Cal.,* 324 U. S. 548 (1945).

What the Court said in *United States* v. *Robinson,* 361 U. S. 220, 229 (1960), applies with even greater force here:

"That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving as it does, many weighty and conflicting considerations, must be resolved through the rule making process and not by judicial decision. * * *"

B. The common law writ of certiorari is not available to petitioner in this case.

Although petitioner did not make in his petition, and has not made in his brief on the merits, the showing required by Supreme Court Rule 31 (App., *infra*, p. 2) as a condition precedent to the issuance of the common law writ of certiorari, he contends, nevertheless, that the Court has jurisdiction under 28 U. S. C. § 1651 (1958), to review the action of the Court of Appeals complained of. This contention is supported by no argument other than a statement in petitioner's "Statement of Jurisdiction" that "* * * the trial court had no authority to enter the judgment of conviction nor did the Court of Appeals have discretion to deny petitioner's petition for allowance of an appeal where the statute's unconstitutionality was the only grounds urged for reversal * * *" (Petitioner's brief, p. 2).

By this statement, petitioner again apparently concedes, as he should, that, in denying the allowance of an appeal, the Court of Appeals exercised the jurisdiction conferred upon it by § 1 of Pub. L. 88-241, 77 Stat. 479, 613, D. C. Code §§ 11-321, 17-104 (Supp. IV, 1965) (App., *infra*. p. 1). Following an affirmance of the judgment of conviction by the District of Columbia Court of Appeals, first a division of the Court of Appeals and then the Court en banc determined that there had not been a sufficient showing of any of the reasons set forth in Rule 1 of its Rules Governing Review of Cases from the District

of Columbia Court of Appeals (App., *infra*, p. 3) to warrant an exercise of the sound judicial discretion which the rule contemplates.

Petitioner has no constitutional right to a review by the Supreme Court of such action of the Court of Appeals. And, certainly, he has no constitutional right to a review by the Supreme Court of the judgment of the District of Columbia Court of Appeals. See *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956); *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940); *McKane* v. *Durston*, 153 U. S. 684, 687 (1894). In this connection, the Court said in *United States* v. *Sanges*, 144 U. S. 310, 319 (1892):

> "The appellate jurisdiction of this court rests wholly on the acts of Congress. For a long time after the adoption of the Constitution, Congress made no provision for bringing any criminal case from a Circuit Court of the United States to this court by writ of error. At February term, 1803, indeed, this court, no objection being made, took jurisdiction of a writ of error sued out by the United States to the Circuit Court for the District of Columbia in a criminal case. *United States* v. *Simms, 1 Cranch,* 252. But at February term, 1805, in a like case, this court, upon full argument and consideration, held that it had no jurisdiction of a writ of error in a criminal case, and overruled *United States* v. *Simms,* Chief Justice Marshall saying: 'No question was made in that case as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.' *United States* v. *More,* 3 Cranch, 159, 172. And it was thenceforth held to be settled that criminal cases could not be brought from a Circuit Court of the United States to this court by writ of error, but only by certificate of division of opinion upon specific questions of law. * * *"

Such right as petitioner had to any review of the judgment of conviction entered by the District of Columbia

Court of General Sessions is controlled by Pub. L. 88-241, § 1, 77 Stat. 479, 613, D. C. Code §§ 11-321, 17-104 (Supp. IV, 1965) and provided, of course, the case ever gets into the Court of Appeals, by 28 U. S. C. § 1254 (1) (1958). Consequently, the Congress, having established the conditions of appellate review of cases originating in the District of Columbia Court of General Sessions,[6] absent any showing of the special and unusual circumstances contemplated by 28 U. S. C. § 1651 (1958), the common law writ of certiorari is clearly not available to review the action of the Court of Appeals. See in this connection *Ex parte Farrell,* 189 F. 2d 540 (1st Cir., 1951), *cert. den.,* 342 U. S. 839 (1951), where such a writ was sought to review the action of a District Court in refusing to grant a certificate of probable cause for an appeal in a habeas corpus case. Because more than 30 days had elapsed since rendition of the District Court's order, the Court of Appeals for the First Circuit held that it could grant neither the certificate nor the writ, saying:

> "* * * Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its authority to issue a writ under the 'all writs' section, 28 U. S. C. § 1651, the only effect of which would be to avoid those conditions and thwart the congressional policy. * * * For us to grab hold of the present case under 28 U. S. C. § 1651 would not be in aid of our appellate jurisdiction elsewhere granted by law, but would be a palpable evasion of the

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[6] By the Act of December 23, 1963, Pub. Law, 88-241, § 1, 77 Stat. 485, D. C. Code § 11-741 (Supp. IV, 1965), Congress has provided that:

"(a) The District of Columbia Court of Appeals has jurisdiction of appeals from:

"(1) final orders and judgments of the District of Columbia Court of General Sessions * * *;

* * * * * * * * *

"(b) Except as provided by subsection (c) of this section, a party aggrieved by an order or judgment specified by subsection (a) of this section may appeal therefrom as of right to the District of Columbia Court of Appeals.

* * * * * * * * *

> statutory conditions which Congress has seen fit to impose upon our exercise of appellate jurisdiction in this class of cases." *Id.* at 545.

See also and compare *Wolfe* v. *North Carolina,* 364 U. S. 177, 195 (1960).

The traditional use of this extraordinary writ, both at common law and in the federal courts under 28 U. S. C. § 1651 (1958), has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel such a court to exercise the jurisdiction conferred upon it when it is its duty to do so.

Thus, in *House* v. *Mayo,* 324 U. S. 42 (1945), upon which petitioner so confidently, but mistakenly, relies, the Court, on motion for leave to file a petition for a writ of certiorari,[7] issued the writ in aid of the Court's appellate jurisdiction. There, a habeas corpus petitioner, having been denied by a United States district court the certificate of probable cause which would have allowed him to appeal in forma pauperis, sought such a certificate from the Fifth Circuit Court of Appeals. That court, however, would not even " * * * consider whether the case was one requiring it or a circuit judge to make the certificate of probable cause."

In *De Beers Mines* v. *United States,* 325 U. S. 212, 217 (1945), the writ issued to review the action of the district court in refusing to dissolve a preliminary injunction " * * * respecting a matter lying wholly outside the issues in the case," and the Court, citing with approval, *U. S. Alkali Exp. Asso.* v. *United States,* 325 U. S. 196 (1945), at 217-218, said that, since " * * * the preliminary injunction here granted * * * is one respecting a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order * * *" unless reviewed under 28 U. S. C. § 1651 (1958). The Court then pointed out that the writ has

[7] Supreme Court Rule 31 (2) requires leave of Court to file petition seeking issuance of common law writ of certiorari.

never been available to correct a mere error in the exercise of conceded judicial power and that only " * * * when a court has no judicial power to do what it purports to do —when its action is not mere error but usurpation of power * * *" should the writ be available. *Ibid.*

Here, as urged above, petitioner has failed utterly to make the showing required as a condition precedent to any review under the common law writ of certiorari. And his failure to do so is understandable because, from this record, no such showing could be made.

The all writs section, 28 U. S. C. § 1651 (1958) did not enlarge or expand the jurisdiction of courts in the federal system; rather, it merely conferred auxiliary powers to be exercised in cases where jurisdiction is otherwise granted and already lodged in the courts. *Bankers Life & Cas. Co.* v. *Holland,* 346 U. S. 379 (1953); *Ex parte Fahey,* 332 U. S. 259 (1947); *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21 (1943); *United States* v. *First Federal Savings & Loan Ass'n.,* 248 F. 2d 804 (7th Cir., 1957), *cert. den.,* 355 U. S. 957 (1958).

In this case, the Court of Appeals, in denying discretionary review of the judgment of the District of Columbia Court of Appeals, acted within its conceded jurisdiction. By every standard of measurement, the time limits prescribed by Supreme Court Rule 22 (2) had long expired before the filing of the petition. It is, therefore, too clear for further discussion that there is no appellate jurisdiction of the Court to be aided by the common law writ of certiorari.

II

The Court of Appeals did not abuse its discretion when it denied an appeal from the judgment of the District of Columbia Court of Appeals.

Assuming, *arguendo,* the jurisdiction of the Court to review, under any theory, the action of the Court of Appeals in denying discretionary review of the judgment

of the District of Columbia Court of Appeals, it is clear from a casual examination of the record that the Court of Appeals committed no error when it refused to allow an appeal.

One of the reasons for such disposition of the case by the Court of Appeals was, no doubt, that, as stated by Judge McGowan, the constitutional questions were "* * * urged * * * on the basis of a record which is wholly unrevealing in factual terms," respecting the acts and conduct upon which the judgment of conviction was based (R. 28-29, 34). Yet, in the absence of any record as to such acts and conduct, this Court is asked to consider in isolation the constitutionality of the District of Columbia vagrancy law and to then declare it to be too vague and indefinite to satisfy constitutional requirements. But it is well settled that courts will not consider a constitutional question in a vacuum. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (1945).

Moreover, by virtue of the Court of Appeals' disposition of the case, this Court is without the benefit of a judgment of the highest court in this jurisdiction on the constitutional question presented. This Court, therefore, should not reach the constitutional question. See: *District of Columbia* v. *Little,* 339 U. S. 1 (1950); *District of Columbia* v. *Pace,* 320 U. S. 698 (1944); *Griffin* v. *United States,* 336 U. S. 704, 717 (1949); *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 570 (1947). Cf. *District of Columbia* v. *Thompson Co.,* 346 U. S. 100 (1953).

With respect to the District of Columbia vagrancy statute, petitioner has, however, conjured up hypothetical situations in which the statute *might* be applied by District authorities in violation of First Amendment rights, such as freedom of speech, assembly and religion.

He suggests, for example, that under the District statute the following conduct would constitute proof of leading an "immoral or proffigate life" and would sustain

a vagrancy conviction, i.e., where "* * * a member of the American Nazi Party * * * is peaceably giving a speech on the beliefs of that organization * * *" or members "* * * of an extreme racist group * * * [meet] to discuss peaceful ways to further their cause * * *"[8] (Petitioner's brief, p. 48).

But this Court has consistently refused to consider in the abstract the constitutionality of a criminal statute of this nature. See *Federation of Labor* v. *McAdory*, 325 U. S. 450, 461 (1945). In *United States* v. *Raines*, 362 U. S. 17, 22 (1960), the Court said:

> "* * * The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases * * *. [A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were * * * presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy."

In urging the Court to declare unconstitutional on its face a part of the District of Columbia vagrancy statute, without any reference to the factual setting of his arrest and conviction, petitioner simply ignores the Court's command that such an attack upon a statute must "* * * of necessity be examined in the light of the conduct with

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[8] A vagrancy conviction rests on more than a mere finding that the defendant is leading an immoral or profligate life. There must be an additional finding that he has no lawful employment and no lawful means of support realized from a lawful occupation or source. D. C. Code § 22-3302 (3) (1961).

The hypothetical situations which petitioner sets forth suggest more the *possibility* of abuse under the "disorderly conduct" statute than under the vagrancy statute. See, for instance, *Rockwell* v. *District of Columbia*, D. C. Mun. App., 172 A. 2d 549 (1961); *Allen* v. *District of Columbia*, D. C. App., 187 A. 2d 888 (1963).

which a defendant is charged."[9] *United States* v. *National Dairy Corp.*, 372 U. S. 29, 33 (1963).

In *Lion Manufacturing Corporation* v. *Kennedy*, 117 U. S. App. D. C. 367, 330 F. 2d 833 (1964), the Court of Appeals recently reiterated this point of view, saying:

> "* * * The Supreme Court has but lately indicated that constitutional attacks upon criminal statutes for vagueness are most usefully weighed *in the context of a claim that certain specific conduct is proscribed. United States* v. *National Dairy Corp.*, 372 U. S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963). To assert that an act of Congress is unconstitutional on its face is a formidable contention under any circumstances; *the least that can be required of one who makes it is that he relate himself clearly to the impingement of the statute.* * * *" [Emphasis supplied; footnotes omitted.] *Id.* at 373, 374.

Much to the same effect was *Ellis* v. *Dickson*, 349 U. S. 458, 464 (1955). There, the Court granted certiorari to consider petitioner's claim that certain federal constitutional rights had been denied and that the New York Court of Appeals, by denying an appeal, had thwarted a review of the constitutional claims. Because the record was inadequate as a basis for a decision on the constitutional issues presented, the Court dismissed the writ as improvidently granted, saying:

> "* * * Even if we were to look at the matter ourselves de novo, we could not on this vague

[9] Of course, this is not to deny that this Court has, in a proper case, conferred standing on one who makes an attack against a statute for vagueness on its face, but this has been permitted most often in cases which have involved restrictions on First Amendment freedoms of speech and press. *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *United States* v. *National Dairy Corp.*, 372 U. S. 29 (1963); *Stromberg* v. *California*, 283 U. S. 359 (1931); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Winters* v. *New York*, 333 U. S. 507 (1948). Cf. *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964). The Court has always construed limitations on First Amendment guarantees more strictly than in other areas. *N. A. A. C. P.* v. *Button*, *supra*, at 432; *United States* v. *National Dairy Corp.*, *supra*, at 36. Freedom of press, freedom of speech, and freedom of religion are in a preferred position. See *Busey* v. *District of Columbia*, 319 U. S. 579, 580 (1943), decided on authority of *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943).

> and empty record decide the constitutional issues sought to be presented. This Court has often refused to decide constitutional questions on an inadequate record. * * * In the circumstances of this case, we prefer to rest our decision on the ground that we lack jurisdiction. For if we could not ourselves decide on this record the constitutional issues tendered, we consider that by the same token the New York Court of Appeals was entirely justified in refusing to pass on them, and that we should therefore regard its denial of leave to appeal as resting on an adequate nonfederal ground. * * *" [Citations omitted.]

See also: *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947).

Clearly, therefore, because the record does not establish an adequate basis for an attack upon the District of Columbia vagrancy statute as unconstitutional on its face, the writ of certiorari should be dismissed as improvidently granted. Cf. *Needelman* v. *United States,* 362 U. S. 600 (1960); *Bullock* v. *South Carolina,* 365 U. S. 292 (1961); *Baldonado* v. *California,* 366 U. S. 417 (1961).

III

The District of Columbia vagrancy statute is not unconstitutional as applied to petitioner.

The substance of petitioner's contention respecting the validity of the District of Columbia vagrancy statute is that subsection 3 thereof,[10] under which he was charged and convicted, "* * * is too vague and indefinite to provide sufficient guidance to citizens, the police or the courts." (Petitioner's brief, p. 10.) Significantly enough,

[10] D. C. Code § 22-3302 (1961), provides:

"The following classes of persons shall be deemed vagrants in the District of Columbia:

* * * * * * * *

"(3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

however, there is not even pretense that the language of the statute, when measured by common understanding and practices, is so vague and indefinite that petitioner was not warned of the acts and conduct which it proscribes. In fact, from aught that appears in the record, the statute's application to the acts and conduct of petitioner which resulted in his conviction satisfied every requirement of due process.

Absent any factual foundation in the record showing to the contrary, it must, therefore, be presumed that, as applied to petitioner, the vagrancy statute is constitutional, since the statute comes to the attention of the Court with the strongest presumption of constitutionality of which it is susceptible. Under these circumstances, petitioner should "* * * not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. * * *" *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

The reason for this is that courts will not pass upon the constitutionality of a statute abstractly or in the manner of an academic discussion. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479 (1938). As the Court said in *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923):

> "* * * We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. * * * The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. * * *"

As hereinabove stated, petitioner in this case is eloquent by his silence concerning any specific complaint of the statute's application to his acts and conduct. Without

making any attempt to show that the statute is so vague that he, himself, was unable to determine from its language what conduct was proscribed, he is content to attack its constitutionality by invoking the rights of others. This, petitioner should not be permitted to do. Cf. *Edelman* v. *California*, 344 U. S. 357 (1953).

The vagrancy statute thus brought into question is concerned with an area of law enforcement clearly within the scope of the police power of the Congress in the exercise of its exclusive legislative jurisdiction over the Nation's Capital. United States Constitution, Article 1, Section 8, Clause 17; *District of Columbia* v. *Thompson Co.*, 346 U. S. 100 (1953). Since the Constitution does not impose impossible standards, all that is required of such a statute is that its language convey "* * * sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. * * *" *United States* v. *Petrillo*, 332 U. S. 1, 8 (1947). As will be demonstrated below, this Court and other federal and state courts have found similar statutes to be constitutional against a claim of vagueness.

Thus, a federal statute prohibiting the transportation in interstate commerce of women for "any immoral purpose," withstood attack as to the claimed vagueness of the quoted words. *Caminetti* v. *United States*, 242 U. S. 470 (1917); *Cleveland* v. *United States*, 329 U. S. 14 (1946). In the Immigration and Naturalization Act, the phrase "crime involving moral turpitude" was held not to void the statute because of vagueness. *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951). And the Court has held that a statute which makes it a criminal offense to exhibit in a public place a publication which "' * * * portrays depravity, criminality, unchastity, or *lack of virtue* of a class of citizens, of any race, color, creed or religion * * *' " [Emphasis supplied] is not void for vagueness. *Beauharnais* v. *Illinois*, 343 U. S. 250, 251 (1952).

In *Roth* v. *United States*, 354 U. S. 476 (1957), where the Court held that a statute which makes punishable the mailing of material that is "obscene, lewd, lascivious or filthy" was not ~~factually~~ vague, it said, at 491-492:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ' . . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States* v. *Petrillo*, 332 U. S. 1, 7-8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' *Id.* at 7. * * *" [Citations omitted; footnote omitted.]

Many state courts, in the face of attacks because of vagueness upon the validity of vagrancy statutes similar to that of the District of Columbia, have upheld such statutes. Compare such representative decisions as *State* v. *Harlowe*, 174 Wash. 227, 24 P. 2d 601 (1933) ("lewd, disorderly or dissolute person"); *Ex parte McCue*, 7 Cal. 765, 96 P. 110 (1908) ("idle, dissolute, lewd, or immoral life"). Cf. also *Hunnicutt* v. *State*, 71 Ga. App. 574, 31 S. E. 2d 424 (1944) ("immoral and profligate").

Other District of Columbia criminal statutes proscribe the commission of a "lewd, obscene, or indecent act," D. C. Code § 22-1112 (1961); taking of "immoral, improper, or indecent liberties" with children, D. C. Code

§ 22-3501 (1961); use of "any profane language or indecent or obscene words," D. C. Code § 22-1107 (1961); sale or exhibition of any "obscene, lewd, or indecent book" or "article of indecent or immoral use," D. C. Code § 22-2001 (1961); and inviting or enticing another to engage in acts of prostitution or acts for "any other immoral or lewd purpose," D. C. Code § 22-2701 (1961). Presumably, if petitioner's contentions are correct that the use in the vagrancy statute of the words "immoral or profligate" renders the statute constitutionally void for vagueness, the above-enumerated statutes must likewise be deemed void, because the words of proscription are obviously similar.

Petitioner suggests that the provision of the California statute punishing a *dissolute* person as a vagrant has now "been put to rest" by the enlightened, recent (1961) revision of the vagrancy statute in the California Penal Code (Petitioner's brief, pp. 42-44). He argues that "* * * if the term 'dissolute' is an inadequate standard, then 'immoral or profligate' certainly is * * *" (Petitioner's brief, p. 44).

While the revision of the California Penal Code did make certain amendments to the vagrancy law, it still punishes one "* * * who engages in lewd or dissolute conduct * * *." Cal. Stats. 1961, c. 560, § 2; CAL. PEN. CODE, § 647 (West. Ann. Supp. 1964). Thus, whatever California found objectionable in its previous vagrancy statute, it apparently did not regard the proscription of "lewd or dissolute conduct" as susceptible to constitutional attacks for vagueness.

Contrary to petitioner's claim, therefore, the words "immoral or profligate" in the District of Columbia vagrancy statute are not vague and indefinite; rather, these words are "* * * sufficiently definite to give notice of the required conduct to one who would avoid its penalties. * * *" *Boyce Motor Lines* v. *United States*, 342 U. S.

337, 340 (1952), and petitioner "* * * need not therefore have been a prophet to understand what the statute condemned. * * *" *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 574, n. 8 (1942).

CONCLUSION

From all of the foregoing, it is respectfully submitted (1) that the Court is without jurisdiction and, therefore, the writ of certiorari should be dismissed as improvidently granted; and (2) that, if the Court has jurisdiction, the order of the Court of Appeals denying discretionary review of the judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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STATUTES INVOLVED

28 U.S.C. § 1254 (1958):

> "*Courts of appeals; certiorari* • • •. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree • • •."

Act of December 23, 1963, Pub. L. 88-241, § 1, 77 Stat. 479, 612-613, D. C. Code (Supp. IV, 1965):

> "§ 11-321. *Appellate jurisdiction.*
>
> "(a) In addition to its jurisdiction otherwise conferred by law, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction of appeals from judgments of the District of Columbia Court of Appeals, including judgments of that court rendered on review of orders and decisions of the administrative agencies of the District of Columbia specified by section 11-742 (a)."

• • • • • • • •

> "§ 17-101. *Appeal from District of Columbia Court of Appeals—Filing, form and contents of petition.*
>
> "The petition for the allowance of an appeal from a judgment of the District of Columbia Court of Appeals shall be in writing and shall be filed with the clerk of the United States Court of Appeals for the District of Columbia Circuit. The contents of the petition shall conform with requirements that the United States Court of Appeals prescribes by rule."

> "§ 17-104. *Determination of Appeal from District of Columbia Court of Appeals.*
>
> "If the United States Court of Appeals for the District of Columbia Circuit allows an appeal

pursuant to section 11-321 and this chapter, it shall review the record on appeal, and shall affirm, modify, vacate, set aside, or reverse the judgment, and may remand the cause and direct the entry of such appropriate judgment or order, or require such further proceedings to be had, as is just in the circumstances."

RULES OF COURT INVOLVED

Rules of the Supreme Court of the United States:

"Rule 22. *Review on Certiorari—Time for Petitioning.*

* * * * * * * *

"2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within thirty days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. * * *"

"Rule 31. *Procedure on Application for Extraordinary Writs.*

"1. The petition in any proceeding seeking the issuance of a writ by this court authorized by 28 U. S. C. § 1651 (a) or 28 U. S. C. § 2241 shall be prefaced by a motion for leave to file such petition, and both shall be printed. All contentions in support of the petition shall be included in the petition. The case will be placed upon the miscellaneous docket when forty copies of the printed papers, with proof of service as prescribed by Rule 23 (subject to paragraph 5 of this rule), are filed with the clerk and the docket

fee is paid. The appearance of counsel for the petitioner must be entered at this time.

"2. If the petition seeks issuance of a common law writ of certiorari under 28 U. S. C. § 1651 (a), there must also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. The petition shall, except for the addition of the motion for leave to file, follow as far as may be the form for a petition for certiorari prescribed by Rule 23, and shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate processes. The respondent may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief in opposition, as provided in Rule 24."

* * * * * * * *

Rules of the United States Court of Appeals for the District of Columbia Circuit Governing Review of Cases from the District of Columbia Court of Appeals:

"Title I. *Provisions Relating to the Petition for Allowance of an Appeal.*

"Rule 1. *Character of Cases which May be Considered.*

"Allowance of an appeal from the District of Columbia Court of Appeals is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. * * *"

"Rule 9. *Entry of Orders Allowing or Denying Appeal.*

"Whenever an appeal is allowed or denied, the clerk of this court shall enter an order to that effect, and shall forthwith notify the court below and the parties in this court or their attorneys of record. No mandate issues upon the denial of an appeal."

"Rule 10. *Reconsideration.*

"Whenever an appeal is denied, a petition for reconsideration may be served and filed within 5 days after the entry of the order denying the appeal. The respondent may serve and file an answer thereto within 5 days after the filing of the petition for reconsideration. No further papers shall be filed without leave of this court."

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 51

EDDIE J. HICKS,

Petitioner,

vs.

DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In less than four and one-half folio pages, respondent (the District of Columbia) has apparently exhausted its defense of the constitutionality of Subsection 3—the District of Columbia vagrancy statute which is the subject of this proceeding.* The balance of its argument attempts to show, despite the unqualified granting of certiorari by the Court (379 U.S. 998),** that this scant defense of Sub-

* See Brief for Respondent 20-25.

** When this Court wishes to hear argument on jurisdictional or procedural matters not presented in the petition for certiorari (or in the jurisdictional statement in the instance of an appeal), the practice is to direct specifically that such matters be considered in briefing and arguing. See, *e.g.*, *Konigsberg* v. *State Bar*, 351 U.S. 936 (1956) (certiorari); *Cramp* v. *Board of Pub. Instruction*, 368 U.S. 278 (1961) (appeal). Absent such direction—and when, as here, such matters have been fully aired in the petitioning papers—it can be assumed that the Court does not consider such issues of substantial importance. Since respondent persists in these objections, and since they are in any event matters which are always open, a reply is required.

section 3's constitutionality should not be considered. Since these matters were only mentioned without elaborate discussion in the Brief for Petitioner, a reply is necessary in order that it might not be thought that any procedural vices have, on this occasion, insulated Subsection 3 from scrutiny.

Briefly stated, the issues raised by respondent are three: (1) Does the Supreme Court have the *power* to entertain a petition for certiorari to a United States Court of Appeals in a criminal case when the petition was filed more than 30 days after the rendition of judgment in the Court of Appeals? (2) Does the Supreme Court have the *power* to entertain by writ of certiorari a case involving an unconstitutional statute in which the United States Court of Appeals for the District of Columbia Circuit has denied a petition for allowance of an appeal from the District of Columbia Court of Appeals? (3) Finally, should the Supreme Court review the constitutionality of a statute in a criminal case where the evidence upon which the conviction was obtained was not recorded and thus is not part of the trial or appeal records? These objections will be answered seriatim.

I. Rule 22(2) of This Court, Which Alone Governs the Timeliness of the Petition for Certiorari, Is Not Jurisdictional or Mandatory and May Be Waived by This Court.

The opening brief for petitioner asserted in the Jurisdictional Statement (Brf. for Pet., p. 2) the appropriate dates and orders below and concluded that the filing of the petition for certiorari was timely. As authority, petitioner relied exclusively upon *Heflin* v. *United States*, 358 U.S.

415 (1959). In answer, respondent has discussed and cited cases which are wholly irrelevant to the effect of Rule 22(2). It has *not* cited or discussed *Heflin*. Some of the cases relied upon by respondent have involved statutory time limitations which, of course, are ordinarily jurisdictional and mandatory. Such was the situation in *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) (cited and relied upon in Brief for Respondent, pp. 9-10); and *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Other cases cited by respondent involved the power of *lower* courts to depart from time limitations set by the Supreme Court through the rule-making process. In most instances, these rules are similarly held to be jurisdictional and mandatory for the lower courts. See, *e.g.*, *United States* v. *Robinson*, 361 U.S. 220 (1960) (cited and relied upon in Brief for Respondent, pp. 11-12).

Unlike the situations involved in the cases relied upon by respondent, the *only* provision governing the time within which a petition for certiorari to a United States Court of Appeals in a criminal case must be filed is Rule 22(2) of the Rules of this Court:

"Rule 22. Review on certiorari—time for petitioning

. . . . . .

(2). A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within thirty days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. . . ."

This rule is not dictated by any statute. Section 2101 of 28 U.S.C. which specifies certain time limitations in other types of cases is silent on the matter of petitions for certiorari in criminal cases from the Courts of Appeals. The rule itself apparently has been promulgated under the general power of the Supreme Court under 28 U.S.C. § 2071 to make rules for the conduct of its business. So in *Heflin* v. *United States,* 358 U.S. 415 (1959), when this Court was presented with the question of the applicability of Rule 22(2) to a petition for certiorari to a court of appeals in a criminal case which was not filed until more than 30 days from the date of the judgment below, the Court held that the requirement of Rule 22(2) could be dispensed with "because no jurisdictional statute is involved . . ." (358 U.S. at 418 n. 7).

It was, therefore, within the discretion of the Supreme Court to grant the petition for certiorari filed in this case. Respondent has not intimated that this discretion has not been soundly exercised in this case. Indeed, the Court of Appeals through its order of October 26, 1964 (R. 33), which vacated and reentered as of that date its order of June 15, 1964 (R. 28), necessarily found that the failure of petitioner to seek review within 30 days of June 15, 1964, was caused by the excusable neglect of his attorney. That finding is, of course, not binding upon this Court. But coupled with this Court's unqualified granting of petitioner's writ on February 5, 1964 (R. 36; 379 U.S. 998) and the obvious importance and substantiality of the question presented, it should have been apparent to respondent that the requirement of Rule 22(2) had, in the exercise of this Court's power over the conduct of its own business, been dispensed with.

II. This Court Has the Power to Entertain This Case on a Writ of Certiorari.

The remaining question relating to the jurisdiction of the Court is whether an act of Congress empowers the Court to review by writ of certiorari the judgment of the United States Court of Appeals from the District of Columbia Circuit. Such jurisdiction does exist by force of 28 U.S.C. § 1651(a) which empowers this Court to issue a common-law writ of certiorari.*

It should first be shown why 28 U.S.C. § 1254(1)—the generally applicable provision permitting review on writ of certiorari of cases in the courts of appeals—is not applicable here. Section 1254(1) provides as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."

Reading the statute by itself, there is no apparent reason why it should not be applicable to the present case. The last procedural step required of petitioner by the statute before he could come to the Supreme Court was accomplished when, "in the court of appeals," his petition for allowance of an appeal was denied. His case is, of course,

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* The petitioner's petition for certiorari invoked jurisdiction alternatively, under 28 U.S.C. § 1254(1) or § 1651(a), (so-called common-law certiorari). These are discussed briefly in Brief for Petitioner 1-2. Because of the alternative invocation of jurisdiction, the Rule of this Court (Rule 31(1), (2) and (4)) governing applications for common-law certiorari was not specifically applicable. The showing required by Rule 31 is, however, apparent from the jurisdictional facts presented in the petition for certiorari.

a "civil or criminal case." And the necessary petition for writ of certiorari has been filed and granted.

The only possible impediment to the automatic application of Section 1254(1) is the memorandum order of the Supreme Court entered in 1926 in the case of *Ferguson* v. *District of Columbia*, 270 U.S. 633. The facts in the case have been obtained from the recital given in the Petition for Writ of Certiorari (October Term, 1925; No. 997). The District of Columbia did not file an opposition. Mrs. Ferguson was arrested while picketing a retail store in Washington, D.C., on behalf of two labor organizations. She was charged with violating a police regulation then in force in the District* which, in effect, prohibited picketing by members of organized labor in front of any retail store. Mrs. Ferguson contended that the police regulation was void because it conflicted with Section 20 of the Clayton Act which legalized such picketing and which further specifically stated that such picketing was not to be held to constitute a violation "of any law of the United States." (Clayton Act, § 20, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958).) Following conviction in the District of Columbia Police Court, Mrs. Ferguson petitioned a justice of the Court of Appeals for the District of Columbia for a writ of error to review the conviction. That justice denied the petition and Mrs. Ferguson petitioned the Supreme Court for a writ of certiorari.

Several months after the petition for certiorari was filed, the Supreme Court denied it "for want of jurisdiction in this court under § 240 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1(a), 43 Stat.

* The present District of Columbia statutes and police regulations contain no similar provision.

938. . . ." *Ferguson* v. *District of Columbia, supra,* Section 240 of the then Judicial Code which was the jurisdictional statute construed in *Ferguson* v. *District of Columbia, supra,* provided that the Supreme Court could issue certiorari for the purposes of review "in any case, civil or criminal, in a circuit court of appeals, or *in* the Court of Appeals of the District of Columbia. . . ." (Emphasis supplied.) While the memorandum opinion gives no reasons, it has been interpreted as holding that a case as to which the Court of Appeals has denied an appeal without a hearing on the merits is not a case "in" the Court of Appeals. See *House* v. *Mayo,* 324 U.S. 42, 44 (1945):

> "This Court cannot issue a writ of certiorari in the present case under §240(a) of the Judicial Code, 28 U.S.C. §347(a). *Ferguson* v. *District of Columbia,* 270 U.S. 633. Our authority under that Section extends only to cases 'in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia.' Here the case was never 'in' the court of appeals, for want of a certificate of probable cause."

Were it not for the relative age of the *Ferguson* case, its seeming reaffirmation in *House* v. *Mayo, supra,* and the fact that the statute construed was carried over substantially unmodified in the Judicial Code of 1948 (in 28 U.S.C. § 1254(1)), logic would seem to compel its overruling. But no such drastic exercise of judicial power is necessary. The soundness of the *Ferguson* case need not be considered since ample authority for the exercise of certiorari jurisdiction in the present case exists under the "all writs" section of the Judicial Code, 28 U.S.C. § 1651(a). This section provides that:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

On a number of occasions, as respondent concedes (Brief for Respondent, pp. 14-15), Section 1651(a) or its predecessor statutes have been employed as the jurisdictional basis for the exercise of appellate review by the Supreme Court. On each of these occasions, as in this one, no other statute permitted such review; in fact, the only other applicable statute seemed to have precluded review on writ of certiorari or by any other specific method. See, *e.g.*, *House* v. *Mayo*, 324 U.S. 42 (1945) (28 U.S.C. § 1254(1) held unavailable); *United States Alkali Exports Ass'n* v. *United States*, 325 U.S. 196 (1945) (§ 2 of Expediting Act of 1903, as amended 15 U.S.C. § 29 (1958), permitted review of interlocutory orders only after final judgment in district court). The all writs section cannot, of course, be used in defiance of a specific jurisdictional statute so as drastically to enlarge or expand the jurisdiction of the federal courts. *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 203 (1945); *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383 (1953). And, as pointed out in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943):

> "The traditional use of the writ in aid of appellate jurisdiction both at common-law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. . . ."

The function of the writ is not to correct merely erroneous rulings of law which do not violate the lower court's jurisdictional limitations. *Roche* v. *Evaporated Milk Ass'n, supra* at 27; *Bankers Life & Cas. Co.* v. *Holland, supra* at 382. Especially is this true where the ruling complained of can be reviewed by direct appeal after final judgment at a later stage of the call.

These limitations are, however, inapplicable to the present case. In the first place, if petitioner cannot obtain a hearing in the present case in this Court, he is effectively and finally precluded from attacking in federal court the constitutionality of his conviction. The record in this case speaks eloquently to the point that review in the Court of Appeals is precluded when it is sought from a judgment of the local and inferior Court of Appeals for the District of Columbia. Since the trial court's judgment was "imposition of sentence suspended" (R. 4), petitioner is not in custody and habeas corpus or relief under 28 U.S.C. § 2255 is not available in any federal court. See 28 U.S.C. § 2241 (c); *McNally* v. *Hill*, 293 U.S. 131, 137 (1934). Finally, review by the United States District Court for the District of Columbia (which alone could provide an appeal and hearing as of right in the Court of Appeals)* on a writ of error *coram nobis* is not available since that court is not competent to review judgments entered by the District of Columbia Court of General Sessions. See *United States* v. *Morgan*, 346 U.S. 502, 505 n.4 (1954); *United States* v. *Smith*, 331 U.S. 469, 475 n.4 (1947). Hence, petitioner's final and only opportunity for appellate or other review is the present proceeding. The action of the Court of Ap-

* See 28 U.S.C. § 1291.

peals—if respondent's assertions are accepted—would mean that this Court would be effectively prevented from reviewing a constitutional question whose importance and substantiality is patent.

Secondly, if the Court of Appeals had exercised the power it undoubtedly has under D.C. CODE § 11-741 (Supp. IV, 1965) to review this case when the opportunity was presented to it, then this Court would clearly have been empowered by 28 U.S.C. § 1254(1) to review its decision on the merits. This Court would, therefore, have jurisdiction under 28 U.S.C. § 1254(1) if the Court of Appeals had exercised that power. Should its refusal to do so take from this Court power which it otherwise would have? Clearly not, and it is precisely in cases such as this that the all writs section has previously been employed to bring an unreviewed case before it. Such a case was *House* v. *Mayo*, 324 U.S. 42 (1945).

In the *House* case, the petitioner had been denied a certificate of probable cause by both the district court and the court of appeals under the predecessor to 28 U.S.C. § 2253 in his efforts to seek review of the district court's denial of his petition for habeas corpus. He then sought review in the Supreme Court under the all writs section. This Court held that the all writs section *did* provide the necessary statutory foundation for the exercise of its appellate jurisdiction, stating that

> "by virtue of that Section we may grant a writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it. *In re 620 Church St. Corp.*, 299 U.S. 24, 26, and cases cited; *Holiday* v. *Johnston*, 313 U.S. 342, 348, n.2; *Wells* v. *United States*,

> 318 U.S. 257; *Steffler* v. *United States*, 319 U.S. 38. And not only does our review extend to a determination of whether the circuit court of appeals abused its discretion in refusing to allow the appeal, but if so, it extends also to questions on the merits sought to be raised by the appeal. See *Holiday* v. *Johnston, supra; Steffler* v. *United States, supra*. . . ." (324 U.S. at 44-45.)

The Court examined the petitioner's constitutional objections to his continued confinement and found that a violation of constitutional rights was presented in the petition for habeas corpus. It then examined the decision of the district court denying the petition, found several errors in it, and concluded that:

> "The decision of the district court is thus not supported by the grounds assigned for it, and should have been reversed by the court of appeals. And the judges of that court erred in not considering whether the case was an appropriate one for a certificate of probable cause, as they were authorized to do by 28 U.S.C. § 466 [now 28 U.S.C. § 2253]. We think they also erred in not issuing the certificate." (324 U.S. at 48.)

The only ground upon which respondent has attempted to distinguish *House* v. *Mayo, supra,* is the fact that the court of appeals in that case had not considered whether the case was one requiring it to make a certificate of probable cause. See Brief for Respondent, p. 15, citing *House* v. *Mayo, supra* at 44. But it is clear from 28 U.S.C. § 2253 and from the *House* case itself that the error of the court of appeals which the Supreme Court saw as requiring reversal was not so much that they had failed to consider whether it should

issue a certificate of probable cause but, more importantly, "that they also erred in not issuing the certificate." (324 U.S. at 48.) This latter error could only have arisen because of the obvious merits of the petitioner's constitutional contentions; if those contentions were without obvious merit, there would have been no reason to issue the certificate.

So in the present case, it is not denied that the court of appeals had some measure of discretion under D.C. CODE § 11-741 (Supp. IV, 1965) in determining whether to grant petitioner's petition for allowance of an appeal—just as it has discretion under 28 U.S.C. § 2253 in determining whether to issue a certificate of probable cause. But here, as in *House* v. *Mayo, supra,* the court of appeals refused to exercise that discretion even when the merits of the constitutional question presented were patent. Here, as in *House* v. *Mayo,* that refusal was erroneous and can be reversed by this Court by means of a writ of certiorari issued under the all writs section.

The fact that the court of appeals had, under D.C. CODE § 11-741 (Supp. IV, 1965), some measure of discretion in deciding whether to grant petitioner's petition for allowance of an appeal when it was before that court does not mean that their denial of a hearing is non-reviewable. Discretion does not mean absolute license. The Supreme Court in the exercise of its powers of supervision over the administration of criminal justice in the federal courts, *McNabb* v. *United States,* 318 U.S. 332 (1943), and in the exercise of its sound discretion under the all writs section, *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196, 202 (1945); *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, 25 (1943) (and cases cited), unquestionably has the power to review such an exercise of discretion. That is the purpose of the present proceeding.

And when, as here, the seriousness and gravity of the constitutional question presented is apparent from the very face of the statute (Subsection 3) which is under attack, only the gravest considerations should suffice as reason for the court of appeals to deny the exercise of its discretionary jurisdiction. No grave consideration—no trifling consideration—existed in this case to justify the action of the court of appeals. The order of that court denying the petition for allowance of an appeal (R. 18-29, 33-34) is completely bereft of even an attempted justification. And the only reason which respondent has advanced to justify it (the absence of evidentiary facts) is completely without merit in the present case (see below). In such a posture, the action of the court of appeals was an abuse, not an exercise, of its discretion under D.C. CODE § 11-741 (Supp. IV, 1965). See *De Beers Consol. Mines* v. *United States*, 325 U.S. 212 (1945); *House* v. *Mayo*, 324 U.S. 42 (1945); *Holiday* v. *Johnston*, 313 U.S. 342 (1941); *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24 (1936).

III. No Facts Necessary or Appropriate for Consideration of the Merits of This Case Are Absent From the Record.

Respondent contends that the Court of Appeals was justified in refusing to consider petitioner's appeal on its merits because the sole constitutional question presented was urged "on the basis of a record which is wholly unrevealing in factual terms. . . ."* This contention completely mis-

* Brief for Respondent, p. 17, quoting from the concurring memorandum of Judge McGowan in the order denying the petition for allowance of an appeal (R. 28-29, 34). Judge McGowan was writing here only for himself and not for any of the five other judges who voted to deny the petition. The extreme unlikelihood of preserving a fair and accurate factual record is commented upon in Brief for Petitioner, pp. 44-45.

understands the nature of petitioner's constitutional objections and disregards the well-settled distinction between an attack upon a statute "on its face" and one which attacks only the application of a statute. The present case involves only the former and while respondent's arguments might be valid as applied to the latter form of attack, they are irrelevant here.

Briefly stated, petitioner maintains that the vagrancy statute under which he was convicted—which defines a vagrant as one who is "leading an immoral or profligate life"—is on its face, void for vagueness regardless of what evidence may be adduced at trial to support an information under it.

It would be instructive at the beginning to set out what petitioner is not contending. First, he does not assert that the statute is constitutional as to him but would have unconstitutional application as against persons who are not parties to this case. See generally, Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962). Thus, the line of cases represented by *Raines* v. *United States,* 362 U.S. 17 (1960), is not relevant. Secondly, petitioner's attack on the statute has been made only after it was specifically applied to him. Decisions such as *Alabama St. Fed'n of Labor* v. *McAdory,* 325 U.S. 450 (1945) (attack on state statute before it was applied by state authorities) (cited in Brief for Respondent, p. 17), are, therefore, wholly inapposite. Finally, petitioner does not maintain that the District of Columbia's vagrancy statute is unconstitutional only in some instances and not in others. See *Yazoo & M.V. R.R.* v. *Jackson Vinegar Co.,* 226 U.S. 217 (1912); and see generally HART &

WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 176-92 (1953).

Petitioner does maintain that under *any* conceivable set of factual circumstances Subsection 3 is void for vagueness. Just such a case was presented in *United States* v. *Petrillo*, 332 U.S. 1 (1947), and the holding of the Court on the issue of the necessity for a factual record is directly applicable here:

> "One holding of the District Court was that, as contended here, the statute is repugnant to the due process clause of the Fifth Amendment because its words, number of employees needed by such licensee, are so vague, indefinite and uncertain that persons of ordinary intelligence cannot in advance tell whether a certain action or course of conduct would be within its prohibition . . . The information here, up to the place where it specifically charges the particular means used to coerce the licensee, substantially employs this statutory language. And the motion to dismiss on the ground of vagueness and indefiniteness squarely raises the question of whether the section invoked in the indictment is void *in toto*, barring all further actions under it, in this, and every other case. *Cf. United States* v. *Thompson*, 251 U.S. 407, 412. Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof. *Rescue Army* v. *Municipal Court, supra; Watson* v. *Buck*, 313 U.S. 387, 402. *Borden's Company* v. *Baldwin*, 293 U.S. 194, 204, 210, and concurring opinion at p. 213. But no refinement or clarification of issues which we can reasonably anticipate would bring into

> better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant. Consequently, since this phase of the appeal raises a question of validity of a statute within our jurisdiction under the Criminal Appeals Act, *supra,* and is ripe for our decision, we turn to the merits of the contention. . . ." (332 U.S. at 5-6.)

And so in the present case, no facts are necessary to determine whether the words "leading an immoral or profligate life" are unconstitutionally vague on their face. These words are so flagrantly amorphous that there could not possibly be here a narrowing construction if the application of the statute was doubtful. Compare *United States* v. *Raines,* 362 U.S. 17 (1960).

In addition, petitioner claims that the District of Columbia vagrancy statute has a potentially inhibiting effect on the exercise of the freedoms of expression (Brief for Petitioner, pp. 47-49). This potentially inhibiting effect is patent. And in such cases there is no requirement that there be facts of record showing that the person attacking the statute was engaged in constitutionally privileged activities. The reason for the lack of such a requirement has been well stated in *National Association for the Advancement of Colored People* v. *Button,* 371 U.S. 415, 432-33 (1963):

> "For standards of permissible statutory vagueness are strict in the area of free expression. See *Smith* v. *California,* 361 U.S. 147, 151; *Winters* v. *New York,* 333 U.S. 507, 509-510, 517-518; *Herndon* v. *Lowry,* 301 U.S. 242; *Stromberg* v. *California,* 283 U.S. 359; *United States* v. *C. I. O.,* 335 U.S. 106, 142 (Rutledge, J., con-

curring). Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98; *Winters* v. *New York, supra,* at 518-520. *Cf. Staub* v. *City of Baxley,* 355 U.S. 313. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *Cf. Marcus* v. *Search Warrant,* 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *Cf. Smith* v. *California, supra,* at 151-154; *Speiser* v. *Randall,* 357 U.S. 513, 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell* v. *Connecticut,* 310 U.S. 296, 311."

It is clear, then, that the absence from the record of the evidentiary facts upon which petitioner was convicted is no impediment at all to a full and fair adjudication of the

constitutional question presented. The court of appeals did not give this (or any other reason) as a justification for its refusal to hear the case. But even if we assume with respondent that it *might* have, that justification is wholly unavailing. That refusal thus stands bereft of any possible justification or excuse; it stands forth not as an exercise of discretion but as an abdication of reasoned choice. It was erroneous and should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1965.

Eddie J. Hicks, Petitioner, *v.* District of Columbia.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1966.]

Per Curiam.

The writ of certiorari is dismissed as improvidently granted.

SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1965.

Eddie J. Hicks, Petitioner, v. District of Columbia. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 28, 1966.]

Mr. Justice Harlan, concurring.

Among the several reasons which support the action of the Court in dismissing the writ in this case as improvidently granted, I rest my decision to join in this disposition on the lack of a record, without which I do not believe the constitutional issues tendered can properly be decided.

SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1965.

Eddie J. Hicks, Petitioner, v. District of Columbia. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 28, 1966.]

Mr. Justice Douglas, dissenting.

I.

We granted certiorari in this case to consider what I think is an important question: the constitutionality of petitioner's conviction of "vagrancy." Relying on our determination that this case presented substantial questions of constitutional law, the parties comprehensively briefed those questions and we heard argument. But now the Court decides that the case must be dismissed as improvidently granted.

With all respect, I must dissent from this disposition of the case.

In the first place, the alleged "untimeliness" of the petition was called to the attention of the Court by respondent in his brief opposing the grant of certiorari. We were thus fully aware of this point when we granted the writ. Moreover, Rule 22 (2) is not jurisdictional or mandatory and may be waived by this Court under proper circumstances, at least where no jurisdictional statute is involved. *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7. Having brought the case here, required the parties to brief the issues, and heard argument, it is most inappropriate to decline to exercise our discretion and waive the time bar of Rule 22 (2).[1]

[1] The above assumes that Rule 22 (2) applies to this case. Our jurisdiction to review this decision is not based on 28 U. S. C. § 1254 (1) (1964 ed.) which we previously held did not permit review

Nor, in my opinion, is the objection to the adequacy of the record well founded. Petitioner argued in this Court that the statute defining "vagrant" is unconstitutionally vague. The challenged statute is § 22–3302 (3) of the District of Columbia Code, and it provides that a "vagrant" is:

> "Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

We do not need a detailed account of the particular facts of this case in order to pass on the claim that this statute lacks the specificity that due process of law requires. In *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, we said:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."

The Court held the challenged statute bad in that case without considering the defendant's conduct which formed the basis of the prosecution. If a penal statute is so imprecise as to deny fair warning to those who might transgress it, any conduct of the defendant prosecuted

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by writ of certiorari to cases where the Court of Appeals for the District of Columbia Circuit refused to allow an appeal. *Ferguson* v. *District of Columbia*, 270 U. S. 633. Our jurisdiction is founded on the power to issue a common-law writ of certiorari. *House* v. *Mayo*, 324 U. S. 42; 28 U. S. C. § 1651 (a) (1964 ed.). Arguably, Rule 22 (2) has no application in cases involving extraordinary writs. Rule 31 which governs the procedure on applications for extraordinary writs imposes no time limit.

under it which might have been proscribed by a more precisely worded statute is irrelevant.

The *Lanzetta* case is close kin to the present one because the crime there charged was one of being a "gangster" which was defined as any person "not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State." The Court, without considering the facts of record, looked only at the statute and the charge of the indictment and ruled that the Act was unconstitutional for vagueness.

If one takes my view and approaches this case as an attempt by the Government to regulate the *status* of being a vagrant, the absence of a detailed record is—as with the vagueness point—no impediment to proper analysis.

II.

Our vagrancy laws stem from the series of the Statutes of Labourers (23 Edw. 3; 25 Edw. 3, st. 1) first passed in 1349 and amended and modified from time to time over the next 200 years.[2] They reflected "the criminal aspect of the poor laws." [3] They "confined the labouring popu-

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[2] Stephen, History of the Criminal Law of England 203 *et seq.* (1883).

[3] *Id.*, at 266; see 2 Holdsworth, History of English Law, 459–462 (1927). The purpose of these statutes was to offset the loss of workers and to check the rise in wages which resulted from the Black Death. Those able to work, and lacking other means of support were compelled to work, and at regulated wages. Workers were confined to their existing place of residence. Stephen suggests that the "object of this legislation was to provide a kind of substitute for the system of villainage and serfdom which was then breaking down. . . ." Stephen, *op. cit. supra*, at 204. See also Kenny, Outlines of Criminal Law (Turner ed.) 411 (1958). Early laws forbidding begging distinguished between beggars "able to serve or

lation to stated places of abode, and required them to work at specified rates of wages. Wandering or vagrancy thus became a crime." [4] History tells the story from the point of view of the Establishment: that wandering bands of people, who had left their masters, committed all sorts of crimes and hence must be punished for wandering. That philosophy obtains in this country, because the English statutes provided the seed of our vagrancy laws. Article IV, § 1 of the Articles of Confederation assured the free inhabitants of each State, save "paupers, vagabonds, and fugitives from Justice," the privileges and immunities of citizenship of the several States, and the right of free ingress and egress to and from each State.

But there was incongruity in superimposing the English anti-migratory policy upon the law of America:

> "Vast movements of people motivated by urgent economic need settled this country from Europe, pushed settlement westward and fed growing cities from rural population reservoirs. England's Enclosure Acts, by withdrawing land from agricultural use, swelled the army of English vagrants; America invited migration with the lure of free land. The same elements of the population who on one side of the Atlantic were rogues and vagabonds, on the other were frontiersmen." [5]

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labor" and "beggars impotent to serve." See, *e. g.*, 12 Rich. 2, c. 7. Economic conditions changed; when work became scarce, laborers were forced to look elsewhere. The focus of the laws dealing with laborers shifted; the ban on migration became a preventive to keep a parish from being saddled with the needs of foreign paupers and idlers. "The vagrant came to be regarded rather as a probable criminal than as a runaway slave. He must be made to work or else be treated as a criminal." Stephen, *op. cit. supra*, at 274.

[4] Stephen, *op. cit. supra*, at 267.

[5] Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603, 617 (1956). And see Scott, Criminal Law in Colonial Virginia 272–275 (1930).

America's vagrancy laws were expanded to cover a host of acts other than wandering—begging, drunkenness, disorderly conduct, loitering, prostitution, lewdness, narcotics peddling, and so on. They were justified here, as in early England, as devices of control. This Court, writing in 1837, said:

> "We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease." *City of New York* v. *Miln,* 11 Pet. 102, 142–143.

The wanderer, the pauper, the unemployed—all were deemed to be potential criminals. As stated by the Court of Appeals for the District of Columbia in *District of Columbia* v. *Hunt,* 163 F. 2d, 833, 835, "A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life." The vagrant, therefore, is not necessarily one who has committed any crime but one who reflects "a present condition or status." *Handler* v. *Denver,* 102 Colo. 53, 58. Cf. *Ex parte Branch,* 234 Mo. 466, 470–471. That condition is not a failure to make a productive contribution to society, for the idle rich are not reached. The idle pauper is the target. Insofar as that status reflects pauperism it suggests the need for welfare; and insofar as it reflects idleness it suggests the need for the intervention of employment agencies. I do not see how under our constitutional system either of those elements can be made a crime. To do so serves the cause either of arrests and convictions on suspicion or of arrests and convictions of unpopular minorities (*Edelman* v. *California,* 344 U. S. 357, 366, dissenting opinion)—pro-

cedures very convenient to the police [6] but foreign to our system.

I do not see how economic or social status can be made a crime any more than being a drug addict can be. *Robinson* v. *California*, 370 U. S. 660, 668 (concurring opinion).[7] No overt act of criminal dimensions is charged here. Petitioner was either arrested on suspicion [8] or for innocent acts [9] which were used as a cloak for an arrest on grounds the police could not establish. In either event the arrest and conviction were, in my view, unconstitutional.

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[6] Foote, *op. cit. supra*, n. 5, at 625 *et seq.*

[7] The volume of vagrancy cases in the courts each year is large. The most recent FBI Crime Reports show that in 1964, in 3,012 cities with populations exceeding 2,500, 125,763 vagrancy arrests were made (out of a total of 4,155,924 arrests for that same period). Uniform Crime Reports—1964, p. 120.

[8] For the prevalency of arrests "on suspicion" or "for investigation" in the District of Columbia, see Report and Recommendations of the Commissioners' Committee On Police Arrests for Investigation (the Horsky Report), July, 1962.

[9] He was either arrested for playing a guitar in a park (see Appendix) or for sleeping in a men's room (cf. Jean Valjean in Victor Hugo's Les Miserables), for the information reads as follows:

"Eddie J. Hicks late of the District of Columbia aforesaid, on or about the 19th day of May in the year A. D. nineteen hundred and sixty three, in the District of Columbia aforesaid, and on Dupont Circle north, west, was then and there, and has been since that day and still is a vagrant, to wit; a person leading an immoral and profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation and source and who wanders abroad and lodges in a public park and public comfort stations, living upon the charity of others, and who lives idly and without any settled home, and otherwise leading a profligate life."

APPENDIX.

GUITARIST CONVICTION STIRS PROTEST

By STERLING SEAGRAVE

The Washington Post

June 14, 1963

Eddie Hicks, the 25-year-old Dupont Circle troubadour convicted of vagrancy because he spent his afternoons playing a guitar in Dupont Circle, was given a suspended sentence yesterday.

The American Civil Liberties Union announced it would appeal the Hicks case and attack the constitutionality of his conviction under the vagrancy statute. The ACLU said the statute was unclear and was being used by police to persecute Hicks and others who were only enjoying themselves innocently in a public park.

The young troubadour was arrested by a Park Policeman Wednesday after being warned not to play his guitar in Dupont Circle. As a result, residents of the area and "regulars" in the park are protesting what they consider an invasion of their right to assemble in peaceful recreation.

Top officials of the Interior Department spoke out in favor of guitar playing and folk singing as a "wholesome activity that should not be disturbed but encouraged" in the Nation's public parks.

At the trial Wednesday, Park Policeman James E. Thomas told Judge Thomas C. Scalley that Hicks was unemployed. Hicks testified that he was only visiting Washington for a few weeks and that he had shown Thomas a $20 bill when the policeman had threatened to arrest him for vagrancy if he ever came back to Dupont Circle.

When he was arrested Wednesday, Hicks was sitting on a bench with a friend, his guitar in a case and money in his pocket, testimony showed.

At the sentencing yesterday, Judge Scalley told the minstrel he was suspending sentence and that Hicks was free on "personal bond." The conviction went down on his record, however.

Reaction came swiftly. At Dupont Circle, angry sympathizers plotted a demonstration.

"If they are going to stick that boy with a vagrancy conviction just for playing a guitar, they're going to have to arrest several hundred of us. We've been playing guitars there for years," said one.

The regular habitues of Dupont Circle on any given day are neighborhood residents, retired folk, families who pause on a stroll in the summer sun, children who play porpoise in the fountain, couples who doze on the grass, and students.

The students were priced out of Georgetown, moved to Foggy Bottom, then relocated to the Dupont Circle area when urban renewal closed Foggy Bottom to them.

They live for blocks around the Circle in low-rent rooming houses, studios and shared apartments. Most are poor, some are out of school temporarily to work evenings and part-time wherever they can find jobs.

Generally, they are clean-cut, neatly dressed in sports clothes, articulate, quiet and yet quick to take offense when they think civil authorities are breathing too closely on their necks.

When they can, they play chess in the Circle, around the fountain, argue age-old questions, or gather around the talented and untalented guitarists among them for spontaneous folk music sessions that quickly draw the interest and amusement of passers-by.

On recent Sundays, spontaneous "hootenannys" have started out of nothing, drawing small crowds which sat listening on the grass.

On May 19, Park Policemen routed the last hootenanny, sending everyone scurrying for cover. Attorney Arthur Neuman was passing by and snapped pictures.

"It was a peaceful, lawful assembly," Neuman said yesterday. "There was no disturbance and it was commendable and refreshing to see young people engaged in good social behavior rather than roaming the streets committing crimes."

Capt. Raymond S. Pyles, chief of the Third Precinct which includes the Circle, reported, "I cannot recall a single complaint about them."

Walter Pozen, assistant to Secretary of the Interior Stewart Udall, said, "Not only do I think they shouldn't be singled out—they should be encouraged. The parks are there for recreation and general use."

"There's no rule I know against playing in a park," said Conrad Wirth, director of the National Park Service. "I like music myself."

Charles Wolfram, the ACLU attorney who will champion Hicks when the case is appealed, said yesterday that his attack would be against three sections of the vagrancy statute.

The statute describes a vagrant as "immoral, profligate and dissolute (with) no lawful means of employment or support, without any settled home."

"First," Wolfram said, "the word 'dissolute' is so vague you can't tell what it forbids. Second, the statute discriminates against the poor and the unemployed. Third, it is used by police as carte blanche to harass anyone they personally dislike."

Looking back at the whole episode, attorney Neuman said, "If a man chooses to spend his life playing a guitar, who has the right to insist that he engage in some sort of servitude?"